TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 246.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,
PLAINTIFF IN ERROR,

vs.

RICHARD P. THOMAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED NOVEMBER 13, 1899.

(16,452.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 673.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, PLAINTIFF IN ERROR,

vs.

RICHARD P. THOMAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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a In the Supreme Court of the State of California.

JOHN CHETWOOD, JR., Plaintiff and Respondent,
v.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a Corporation; Richard P. Thomas *et al.*, Defendants; Richard P. Thomas, Appellant. } No. S. F. 177.

Transcript on Appeal.

J. A. Stephens, attorney for appellant.
Thompson & Thompson, attorneys for plaintiff.

Filed July 3rd, 1895.

T. H. WARD, *Clerk*,
By E. A. BUTTERWORTH,
Deputy Clerk.

1 *Amended Complaint.*

In the Supreme Court of the State of California.

In the Superior Court of the City and County of San Francisco, State of California, Department No. 3.

JOHN CHETWOOD, JR., Plaintiff,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a Corporation; Richard P. Thomas, Robert R. Thompson, Robert A. Wilson, and S. P. Young, Receiver of said Bank, Defendants.

Bill of complaint in equity for accounting and settlement of trust by the defendants Richard P. Thomas, Robert R. Thompson, and Robert A. Wilson.

2 The plaintiff herein, individually and as the representative of all of the stockholders of the corporation the California National Bank of San Francisco, for the benefit of the said corporation, files this bill of complaint herein and alleges:

That the California National Bank of San Francisco, on or about the 20th day of October, A. D. 1886, became, ever since then has been and it now is a national banking corporation, duly organized and existing under the laws of the United States of America, with a capital stock of two hundred thousand ($200,000) dollars, divided into two thousand (2,000) shares of the par value of one hundred ($100) dollars each.

That, on or about the date above mentioned, all of the said capital stock of said corporation was duly taken and fully paid up by divers persons of whom the plaintiff herein was one; that this plaintiff, on or about the said date, so as aforesaid, became one of the stockholders of said corporation; he duly subscribed for and

took twenty (20) shares of said stock and unto said corporation duly paid for the same the full par value thereof, to wit, the sum
3 of two thousand ($2,000) dollars in gold coin of the United States of America.

That plaintiff never has sold or in any way disposed of his said stock or any part thereof, but ever since about the 20th day of October, A. D. 1886, he, this plaintiff, continuously has been, and he now is, the holder and owner of said twenty shares of capital stock of said corporation.

That in and upon the creation of said corporation it was in due form in and by its articles of association provided that its board of directors should be and consist of seven of the shareholders thereof.

That on or about the 20th day of October, A. D. 1886, the first meeting of the shareholders of said corporation, upon due and sufficient notice, was duly held, and at said meeting the board of seven directors was duly elected; each and all of said seven directors were shareholders of said corporation; they accepted said position of directors and thereupon, on or about said date, the said board of seven directors duly organized.

That in and by the aforesaid articles of association of said
4 corporation the following provisions were each duly made and adopted, to wit:

That the board of directors of said corporation should have power, and it was made its duty, from their number to elect a president and vice-president, define the duties of the officers and clerks of the corporation, to make all by-laws which it might be convenient and proper to have made, for the general regulation of the business of the corporation and the management and administration of its affairs, and generally, to do and perform all the acts legal for a board of directors to do.

That the above-named defendants Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, were three of the seven persons who were so, as aforesaid, elected directors of said corporation; after said first election of directors, shareholders' meetings were, annually held, at which the same three persons were re-elected directors; and they have, each and all three of them, remained, and they still are, such directors.

That, on or about said date above mentioned, said seven persons, the board of directors of said corporation, after their election
5 as such, on due notice held a regular meeting of said board and duly adopted a code of by-laws for said corporation and its said board of directors, which said code of by-laws has never, as this plaintiff is informed and believes and on his said information and belief alleges, in any respect been changed, ever since its adoption it has been and still is in full force and effect; the said code of by-laws is in sections duly numbered from 1 to 25. Section 7 of said code of by-laws, is as follows, to wit:

"Executive Committee—Its Duties and Powers.

"SEC. 7. There shall be appointed by the board of directors a committee known as the executive committee, consisting of the president, vice-president, and one or more directors, to continue to act until succeeded, who shall have and exercise immediate supervision of all the officers and business of this bank; who shall audit all bills for current and other expenses, who shall have power to discount and purchase bills, notes and other evidences of debt, and to buy and sell bills of exchange, coin and bullion, and loan money on personal security, and who shall at each regular meeting of the board of directors make a report of all bills, notes and other evidences of debt discounted or purchased by them for the bank and of concurrent and other expenses audited since their last previous report."

Section 17 of said code of by-laws is as follows:

"The president shall have general control and supervision of the affairs of the bank; he shall sign all certificates of stock, all receipts for circulating notes received from the Comptroller of the Currency, and also shall have authority to sign all contracts, evidences of debt or other instruments proper and necessary in the ordinary course of business of the bank or which has been approved by the board of directors. He shall have power and authority to discount bills, notes, or other evidences of debt and make loans not exceeding ten thousand dollars to any single individual, firm or corporation, buy and sell exchange, sign certificates of deposit and draw checks and warrants upon the bank. He shall be responsible for all sums of money and personal property of every kind which may be entrusted to his care or come under his control as president; and he shall pay over and deliver the same upon the order of the board of directors, or to any person who may be authorized to demand and receive the same. He shall call special meetings of the board of directors and of the stockholders whenever the interests of the bank shall require or whenever requested by two directors. He shall perform all duties required of him by the bank laws of the United States, or by its proper officers, and shall see that all reports are promptly and accurately made and forwarded. He shall give bond in the sum of ten thousand dollars with security to be approved by the board of directors for the faithful discharge of his duties. He shall also prepare and present to the stockholders at their annual meeting such a statement of the property and business of the bank for the preceding year, as will enable them to understand fully the financial condition and prospects of the bank. He shall also have supervision of all employees of the bank and may suspend them when necessary, reporting his action and occasion thereof to the board of directors, at its next meeting."

Section eighteen of said code of by-laws is as follows:

8 *"Vice-President's Duties and Powers.*

"SEC. 18. The vice-president shall assist the president in the discharge of his duties, and in the absence or inability of the president he shall perform all the acts, exercise all the powers, and be subject to the same liabilities as that officer. He shall give bond in the sum of ten thousand dollars, with security to be approved by the board of directors, for the faithful discharge of his duties."

That, thereupon at said meeting of the board of directors after the adoption of said code of by-laws, subject to and in accordance therewith, an election of officers of said corporation and board of directors thereof, the above-named defendants Robert A. Wilson & Richard P. Thomas were duly & respectively elected vice-president & president of said corporation and board of directors thereof, and the three defendants above named, Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, were duly elected and by said board appointed the executive committee of said corporation and board of directors and no other director was elected or appointed on said committee, and ever since the organization of the board
9 in October, 1886, said three persons have constituted and been the said executive committee under said by-laws.

That thereupon each of said defendants, Thomas, Thompson and Wilson, duly accepted said offices to which they had, as last herein aforesaid, been elected and appointed; annually, after said first organization of the board of directors, upon the seven directors being re-elected, as herein aforesaid, the said board reorganized and re-elected said officers, to wit, the defendant Richard P. Thomas as president, the defendant Robert A. Wilson as vice-president, and the three defendants, Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, as executive committee, and said three defendants, Thomas, Thompson and Wilson, from the time, in October, 1886, of their first election continuously were and remained, and they still are and remain the said officers of the corporation and its board of directors, to wit, Richard P. Thomas, president; Robert A. Wilson, vice-president, and Richard P. Thomas, Robert R. Thompson and Robert A. Wilson the executive committee of said corporation and board of directors.

10 That upon their said election and appointment as such officers the said three defendants severally and as such president, vice-president and executive committee, duly accepted the potions of the respective officers and as provided in the above-mentioned code of by-laws and the above-quoted sections thereof, and duly accepted the trusts and obligations to perform each and all of the duties therein prescribed with due skill, care, attention, prudence, diligence and fidelity. That as such executive committee said three persons, Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, immediately upon their said election and appointment as such committee assumed the discharge of the duties thereof, and in due performance of their duties had, from said date of their first

appointment in October, 1886, continuously until the failure of said corporation, which is hereinafter mentioned, the immediate supervision of all the officers and business of said corporation; on the said three said persons, the above-named defendants, Thomas, Thompson and Wilson, as such executive committee, devolved, and continuously remained throughout all of said time, the duty to exercise immediate supervision of all of the officers and business of said bank for
11 said corporation to audit all bills for current and other expenses, to discount and purchase bills, notes and other evidences of debt, to buy and sell bills of exchange, coin and bullion and loan money on personal security, to order, direct and superintend the acts and proceedings of the cashier, clerks and other employés and to exercise vigilence in seeing that the money and other property of the bank were not lost, wasted or misused, and to conduct the business of the corporation upon banking principles, and in such conduct thereof to exercise their own skill and discretion with a view to the preservation of the capital and profit of the corporation, and to cause true records and proper books of account to be kept, and to examine them, personally, with the vouchers; to see that the moneys of the bank were not lent to irresponsible persons or upon inadequate security, or upon securities not conforming to bank usage, or otherwise irregular; to see that, in the purchase of bills of exchange or drafts the same were duly secured, safe and sure to be honored and paid, and were such as conformed in all respects to bank usage and the rules of safe banking.

That it was the duty of each of said members of the exec-
12 utive committee to exercise, concurrently with his associates on said committee, diligence and fidelity in performing the duties of said committee as above detailed. That, well knowing each and all of said facts above recited, and said three persons, above named defendants, Thomas, Thompson and Wilson, severally, being fully aware of the nature and extent of said trust and the duties thereof, accepted and retained the said trust and unto the said corporation promised faithfully to discharge the same and each and all of the said duties thereof in a proper, careful and judicious manner, and with due care, attention, skill, prudence, diligence and fidelity, in full accord with bank usage and the principles of safe banking business, and the said corporation fully confided in their fidelity and diligence and so confiding, entrusted unto said three persons the discharge of the said duties, and duly appointed and retained them in their respective offices.

That the business of said banking corporation was commenced shortly after October, 1886, but afterwards, and for a long space of time the defendants above mentioned, Richard P. Thomas, Robert R.
Thompson and Robert A. Wilson not regarding their aforesaid
13 duties, nor their respective and concurent promises in that behalf, but wholly disregarding the same and contriving together to injure and deceive the said corporation, neglected and omitted, without any reasonable excuse, to exercise their own skill, care, judgment and discretion in the making of loans and discounts out of the moneys in the possession of said bank and otherwise di-

recting the business of said bank, but they negligently permitted the cashier of said bank to control and manage the whole business of the said bank as he saw fit, and without consulting or in anywise informing said defendants, or any or either of them, to lend the moneys of the said bank according to his own pleasure, to buy bills of exchange without any consultation with said defendants or any or either of them, and in such a manner as he, the said cashier, elected, to dispose of all the moneys of said bank, and the said cashier, of his own will and without direction or attempted direction of or by said defendants or any or either of them, lent out of the moneys of said bank large sums of money to divers irresponsible persons with no adequate security, bought unauthorized, unsecured & valueless bills of exchange, & on informal promises
14 & pretended securities which were of little or no value & such as were not usual in bank dealing nor capable of discount nor well approved as banking securities nor safe securities for any bank to take, or well adopted to preserve the capital stock thereof; all of which said loans, notes, drafts & bills of exchange were & are wholly valueless & unpaid & cannot in anywise be realized upon.

That by such negligence worthless loans, & the various transactions above mentioned, the moneys of the corporation were wasted, misused & lost, as this plaintiff is informed & believes, & on his information & belief alleges, at the time of the failure of the bank hereinafter referred to, to a sum & amount of about two hundred thousand dollars.

That to this plaintiff the entire details of the misuse of the money of the bank are unknown; that one of the improper uses of said money was as follows: to wit—

Some time in the summer of 1888 one J. H. Woodard, who was a man of no considerable means, offered for discount to said cashier his, the said Woodard's drafts, & also the drafts of the Alameda County Railroad Company, on one Daniel Macauley of New
15 York, who was also a man of no capital or good financial standing. Said drafts were unsecured, & neither the drawer or drawee had any credit, standing or means at all commensurate with the amounts of said drafts, which in all amounted to about seventy-seven thousand dollars; and to buy them at any price was highly injudicious, inconsistent with banking principles, reckless & wrong, but, notwithstanding these facts & his knowledge thereof, said cashier bought the drafts of Woodard & paid therefor about the sum of seventy-seven thousand dollars. Said drafts were not paid but were dishonored, no part of the money ever was, could or can be recovered and the corporation lost all of the said money except the sum of $7,500.

Another instance of the aforesaid negligences & omission was as follows: At about the same time as the Woodard transaction above mentioned one David Gutman offered the bank his drafts for discount on one Birnbaum of New York. Neither the said Gutman nor the said Birnbaum were men of any considerable means or of good financial standing and said drafts were not secured, but said

cashier bought the drafts from Gutman to the extent of about $68,000. Said drafts were not paid but were dishonored and
16 no part of the purchase price thereof ever has been or can be recovered except the sum of fifteen thousand dollars.

Another of the said negligences & omissions was as follows: One D. C. Wickam who was not only a man of no financial credit but was of notoriously bad repute and had a well-known criminal record, borrowed of the bank divers large sums of money on his promissory notes, worthless acceptances, & overdrafts to the extent in all of about $45,000. Said notes, acceptances & overdrafts were secured only to the extent of about $10,000. Wickam made entire default in payment, & by its transactions with him the bank lost about $35,000.

That by divers other like careless, unbusinesslike and improvident loans & transactions the said cashier misused & lost divers other sums of money belonging to the bank, amounting in the aggregate to about $50,000 more.

That by one of the aforesaid unbusinesslike & improvident loans, transactions one Chown, a dealer in stoves obtained large sums of money from the bank, without adequate security, and thereby the bank lost about $12,000. That by another of the said im-
17 provident & unbusinesslike transactions one J. T. Cochran, a man of no good credit or commercial standing, obtained at various times from the cashier large sums of money, and about $7,000 thereof has not been repaid, but is hopelessly lost to the bank. That another of the said improvident transactions took place between the cashier and one R. W. Snow. Said Snow was also a man of no capital or good financial rating & through its transactions with & advances to him the bank lost about $6,000. That through & by means of the aforesaid losses resulting from the transactions of the bank with Wickam, Snow, Cochran & Chown alone the capital and surplus of the bank became reduced from $230,000 to about $170,000, and that the said sum of about $170,000 suffered a still further diminution of more than $120,000 and the reduction to about $50,000 by the transactions held as aforesaid with Woodard & Gutman and the reduction of the capital and surplus to said sum of about $50,000 irrespective of other losses rendered it necessary for the bank to suspend payment & go into insolvency and for a receiver to be appointed as hereinafter set forth; and the entire loss on the capital & surplus of about $230,000 & the levy of an
18 assessment of $75,000 hereinafter referred to was the direct and inevitable result of the losses aforesaid, which as hereinbefore detailed resulted from the negligence of the said executive committee. That the loss on the transactions with the said Wickam exceeded in amount the surplus of the bank, and impaired the capital, and after said capital was so impaired the transactions with Woodard & Gutman caused a sudden withdrawal of the cash of the bank to the extent of about $143,000, and consequently said losses on the Wickam, Woodard & Gutman transactions alone & irrespective of any other losses rendered necessary the suspension of the bank, the loss of the capital stock & surplus thereof

& the levy of an assessment and sacrifice of assets thereof hereafter referred to.

That said president, vice-president & executive committee easily could & should have prevented the occurrence of each & all of the said improvident uses of the moneys of the bank by giving attention to & discharging the duties of their said trust, & had they done so none of said losses and improvident uses of money would have occurred, but defendants Thomas, Thompson and Wilson ut-

19 terly neglected their duty in the premises and wilfully neglected to take any care or exercise any supervision of the officials and business of the bank, but negligently permitted the said cashier to do as he pleased with and misuse, waste and lose the moneys of the bank, &, by reason of their negligence & omissions of defendants Thomas, Thompson and Wilson, and not otherwise, each and all of the said losses of the corporation occurred.

That apart from the negligent & careless conduct of the business and the resulting losses hereinbefore mentioned, the corporation did a good business & its profits ought to and would have been very large & a surplus had been accumulated in the less than two years of the existence of the bank of upwards of $30,000, which with the other assets above referred to was lost by the aforesaid improvident loans &c. of the cashier and the aforesaid negligence of defendants Thomas, Thompson and Wilson.

That by reason of the negligence of said defendants and the acts and misconduct of the cashier negligently permitted as aforesaid, the bank suddenly failed on the 15th day of December, 1888, became insolvent, & it closed its doors and stopped doing business.

20 At the time of said failure and stoppage of business the bank owed large sums of money, aggregating about $450,000 to divers persons who were depositors of money in said bank.

That of each and all of the facts hereinbefore recited of the failure, suspension and stoppage of business of said corporation, the California National Bank of San Francisco, the Comptroller of the Currency of the United States was duly notified and informed. The said comptroller thereupon made due investigation and examination of the condition of the business and affairs of the corporation defendant herein, the said national banking association, and by the investigation and examination aforesaid, he, the said officer, the Comptroller of the Currency of the United States, became fully satisfied of the foregoing facts, to wit: That the corporation was insolvent, that its capital stock was lost, that it had closed its doors, stopped business and failed and thereupon, being so satisfied, the said comptroller appointed as receiver, said S. P. Young, and said Young duly proceeded to close up the association according to law.

21 That said defendant, S. P. Young still remains such receiver and as such has possession of all of the assets of the bank and upon his information and belief, plaintiff alleges:

That to realize from and promptly turn into money the assets of the bank and to pay its depositors the receiver has been compelled

to and he to some extent has sacrificed the assets of said bank, to wit: to the extent of between twenty and thirty per cent. of the assets thereof, and thereby the corporation has lost between twenty and thirty per cent. of its said assets.

That the comptroller in order to pay the debts of the bank has been obliged to and has levied an assessment of $75,000, upon the stockholders thereof, all of which has been collected except about $20,000 due upon the stock held by the defendant Richard P. Thomas.

That the defendants Thomas, Thompson and Wilson are financially responsible and able to make good the losses which have resulted to said corporation by reason of their said negligence, and a judgment against them for the entire amount of such losses can be made and collected.

That the plaintiff has requested the said corporation and
22 its board of directors to bring suit against said Thomas, Thompson and Wilson for the amount of money which the corporation has lost by their negligence, but said corporation and its board of directors neglect and refuse and have always neglected and refused, to bring such, or any suit or legal procedure, or to take any action whatever in the premises, and no action of the kind, or at all in the premises, has been brought, and therefore, because of such neglect and refusal to act, by said corporation and its board of directors, this plaintiff, for the corporation, brings this present action making said corporation a defendant thereto.

That this plaintiff has requested the said receiver, S. P. Young, as such receiver, for the corporation, to bring and prosecute to final judgment, suit against the above-mentioned Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, the president, vice-president and executive committee, as above mentioned, for the amount of money lost by reason of the negligence of said trustees, as is hereinbefore recited; but the said receiver neglects and refuses and has always neglected and refused, to bring such, or any, suit
or legal procedure, or to take any action whatever in the
23 premises, and no action in the premises has been brought, and therefore, because of such neglect and refusal to act by the receiver, he and the said corporation are made a defendant hereto.

That this plaintiff has requested the Comptroller of the Currency of the United States, as such official, for the said corporation to bring and prosecute to final judgment, suit against the above-mentioned Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, the president, vice-president and executive committee, as above mentioned, for the amount of money lost by reason of the negligence of said trustees as is above recited, but the said comptroller neglects and refuses and has always neglected and refused to bring such, or any, action whatever in the premises, and no action whatever in the premises has been brought, and therefore the said corporation is made a defendant hereto.

Wherefore, this plaintiff prays for a decree herein that the said trustees, the above named defendants, Richard P. Thomas, Robert

R. Thompson and Robert A. Wilson be held to an account-
24 ing of their said trust; that they restore unto said corporation the sum of $400,000 (with legal interest thereon from the time of such loss) so as aforesaid lost by their negligence. That a joint and several money judgment against them, the said Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, for the sum of $400,000, with legal interest thereon from the time of such loss, and costs herein be rendered and entered by this court in this case in favor of said corporation, the California National Bank of San Francisco, and that said corporation, and this plaintiff do have such further order, decree, judgment and relief as may be meet and agreable to equity.

JOHN CHETWOOD, JR.,
In Propria Persona.
THOMPSON & THOMPSON,
Attorneys for Plaintiff.

(Duly verified.)
Filed January 10, 1893.

Demurrer of Defendant Thomas.

(Title of Court and Cause.)

25 Now comes the defendant, R. P. Thomas, by H. D. Talcott, his attorney, and demurs to the amended complaint of plaintiff herein upon the following grounds, to wit:

I.

That this court has no jurisdiction of the persons of any of the parties of this action.

II.

That this court has no jurisdiction of the subject-matter of this action.

III.

That said complaint is uncertain in the following particulars:

a. It cannot be ascertained therefrom who were the "divers irresponsible persons" to whom the cashier therein mentioned, is alleged to have lent large sums of money with no adequate security, or what "unauthorized, unsecured and valueless bills of exchange" said cashier bought, or on what "informal promises and pretended securities" said cashier made such loans or purchases.

b. It cannot be ascertained therefrom what were the "divers other like careless and unbusinesslike and improvident loans and
26 transactions" by which said cashier is alleged to have misused and lost divers sums of money belonging to said bank, and amounting in the aggregate to about $50,000, or when said loans and losses were made.

c. It cannot be ascertained in what manner one Chown therein mentioned obtained large sums of money from the bank without

adequate security, or wherein said cashier or this defendant was negligent or committed any breach of duty in said transaction.

d. It cannot be ascertained in what manner one J. T. Cochran therein mentioned obtained large sums of money from the bank without adequate security, or wherein said cashier or this defendant was negligent or committed any breach of duty in said transaction.

e. It cannot be ascertained in what manner one R. W. Snow obtained a large sum of money from the bank without adequate security, or through what transactions with and advances to him the bank lost said sum or wherein said cashier or this defendant was negligent or committed any breach of duty in said transaction.

IV.

That said complaint does not state facts sufficient to constitute a cause of action.

27

V.

That said complaint does not contain a statement of any facts sufficient to constitute any cause of action against this defendant.

VI.

That said complaint does not state facts sufficient to constitute a cause of action in this, that the plaintiff alleges in his complaint that he demanded the corporation defendant to institute this action against the defendants' officers of said corporation to recover the gross sum of $400,000 lost by the corporation as stated in the complaint; $200,000 of which loss is therein alleged to have been incurred under such circumstances as not to be the natural consequences of any loans of any of the defendants, and such damages are remote and not proximate and could not be legally recovered.

VII.

That the complaint does not state facts sufficient to constitute a cause of action in this, that the complaint shows that no recovery could have been, or can be had for any part of the $200,000 damages claimed in the complaint on account of the loss of the

28 good will of the business of said corporation, and on account of the acts or omission of the receiver in the management or disposal of the assets of said corporation.

VIII.

That said complaint does not state facts sufficient to constitute a cause of action in this, that the complaint shows that defendant Young, under and in pursuance of the act of Congress under which this corporation was organized as a national banking corporation, was appointed receiver of and for said corporation, and that he was and is yet such receiver and acting as such and was acting as such at the time when demand was made upon said corporation to bring this suit, and at the time when this suit was brought, and no right

to bring this action at either of said times existed on the part of this defendant for the redress of any of the wrongs alleged in said complaint.

IX.

That said complaint does not state facts sufficient to constitute a cause of action in this, that the demand of plaintiff upon the receiver, and his refusal to institute this suit created no right, nor conferred any authority upon the plaintiff to bring this suit, nor furnished any justification to him in bringing the same.

X.

That said complaint does not state facts sufficient to constitute a cause of action in this, that after the appointment of a receiver for a national bank and during his incumbrancy of his office as such, neither a demand made upon him by a stockholder of such bank to institute a suit such as this, nor his refusal so to do, creates or confers any right or authority upon such stockholder to institute the same.

XI.

That said complaint does not state facts sufficient to constitute a cause of action in this, that during the time that the affairs of such a corporation as this defendant are in course of liquidation in pursuance of the act of Congress under which it was organized, all of its affairs and interests, including causes of action such as those embraced in this suit are by law committed to the exclusive charge and control or the Controller of the Currency of the United States, and of such receiver as may have been appointed, and are beyond any interference of right of interference on the part of any stockholder of the corporation in this court by action or otherwise.

XII.

That said complaint does not state facts sufficient to constitute a cause of action in this, that there is no averment in said complaint of authorization by the Controller of the Currency to bring this or any action.

January 12, 1893.

H. D. TALCOTT,
Attorney for Defendant R. P. Thomas.

Filed January 12, 1893.

Demurrer of Defendant The California National Bank of San Francisco.

(Title of Court and Cause.)

Now comes the defendant, The California National Bank of San Francisco, *et al.*, and demurs to the second amended complaint of plaintiff herein upon the following grounds, to wit:

31

I.

That this court has no jurisdiction of the persons of any of the parties of this action.

II.

That this court has no jurisdiction of the subject-matter of this action.

III.

That said complaint is uncertain in the following particulars:

a. It cannot be ascertained therefrom who were the "divers irresponsible persons" to whom the cashier therein mentioned, is alleged to have lent large sums of money with no adequate security, or what "unauthorized, unsecured and valueless bills of exchange" said cashier bought, or on what "informal promises and pretended securities" said cashier made such loans or purchases.

b. It cannot be ascertained therefrom what were the "divers other like careless and unbusinesslike and improvident loans and transactions" by which said cashier is alleged to have misused and lost divers sums of money belonging to said bank, and

32 amounting in the aggregate to about $50,000, or when said loans and losses were made.

c. It cannot be ascertained in what manner one Chown therein mentioned obtained large sums of money from the bank without adequate security, or wherein said cashier or this defendant was negligent or committed any breach of duty in said transaction.

d. It cannot be ascertained in what manner one J. T. Cochran therein mentioned obtained large sums of money from the bank without adequate security, or wherein said cashier or this defendant was negligent or committed any breach of duty in said transaction.

e. It cannot be ascertained in what manner one R. W. Snow obtained a large sum of money from the bank without adequate security, or through what transactions with and advances to him the bank lost said sum or wherein said cashier or this defendant was negligent or committed any breach of duty in said transaction.

IV.

That said complaint does not state facts sufficient to constitute a cause of action.

33

V.

That said complaint does not contain a statement of any facts sufficient to constitute any cause of action against this defendant.

VI.

That said complaint does not state facts sufficient to constitute a cause of action in this, that said complaint does not contain a statement that plaintiff ever demanded or requested this defendant to institute any action against any officers of said corporation to recover any amount lost to said corporation by reason of the loss of the good

will of its business, nor to recover any sum lost by reason of the defendant Young as receiver disposing of the assets of said corporation for less than the same would have realized had not such bank suspended or failed.

VII.

That said complaint does not state facts sufficient to constitute a cause of action in this, that the plaintiff alleges in his complaint that he demanded the corporation defendant to institute this action against the defendants' officers of said corporation to recover
34 the gross sum of $400,000 lost by the corporation as stated in the complaint; $200,000 of which loss is therein alleged to have been incurred under such circumstances as not to be the natural consequences of any loans of any of the defendants, and such damages are remote and not proximate and could not be legally recovered.

VIII.

That the complaint does not state facts sufficient to constitute a cause of action in this, that the complaint shows that no recovery could have been, or can be had for any part of the $200,000 damages claimed in the complaint on account of the loss of the good will of the business of said corporation, and on account of the acts or omission of the receiver in the management, or disposal of the assets of said corporation.

IX.

That said complaint does not state facts sufficient to constitute a cause of action in this, that the complaint shows that defendant Young, under and in pursuance of the act of Congress under which this corporation was organized as a national banking corporation, and that he was and is yet such receiver and acting as such
35 and was acting as such at the time when demand was made upon said corporation to bring this suit, and at the time when this suit was brought, and no right to bring this action at either of said times existed on the part of this defendant for the redress of any of the wrongs alleged in said complaint.

X.

That said complaint does not state facts sufficient to constitute a cause of action in this, that the demand of plaintiff upon the receiver, and his refusal to institute this suit created no right, not conferred any authority upon the plaintiff to bring this suit, nor furnished any justification to him in bringing the same.

XI.

That said complaint does not state facts sufficient to constitute a cause of action in this, that after the appointment of a receiver for a national bank, and during his incumbrancy of his office as such, neither a demand made upon him by a stockholder of such bank to

institute a suit such as this nor his refusal so to do, creates or confers any right or authority upon such stockholder to institute the same.

36 XII.

That said complaint does not state facts sufficient to constitute a cause of action in this, that during the time that the affairs of such a corporation as this defendant are in course of liquidation in pursuance of the act of Congress under which it was organized, all of its affairs and interests including causes of action such as those embraced in this suit are by law committed to the exclusive charge and control of the Controller of the Currency of the United States, and of such receiver as may have been appointed, and are beyond any interference or right of interference on the part of any stockholder of the corporation in this court by action or otherwise.

XIII.

That said complaint does not state facts sufficient to constitute a cause of action in this, that there is no averment in said complaint of authorization by the Controller of the Currency to bring this or any action.

January 12, 1893.

H. D. TALCOTT,
Attorney for Defendant The California National Bank.

Filed January 12, 1893.

37 *Demurrer of Defendant Thompson.*

(Title of Court and Cause.)

The defendant R. R. Thompson demurs to the last-amended complaint of the plaintiff herein upon the grounds following, to wit:

1.

That the court has no jurisdiction of the subject of the action.

2.

That the complaint does not state facts sufficient to constitute a cause of action.

3.

That several causes of action have been improperly united, to wit: An individual cause of action in favor of plaintiff personally is improperly united in said amended complaint with a cause of action in favor of plaintiff as the representative of all of the stockholders of the corporation called the California National Bank of San Francisco, and in both capacities plaintiff seeks to recover a judgment against defendants herein.

4.

38 That said complaint is ambiguous in this: It is alleged herein that the plaintiff, "individually and as the representative of all the stockholders of the corporation called the California National Bank of San Francisco, for the benefit of the said corporation, files this bill of complaint herein and alleges;" hence it is ambiguous in that it cannot be told therefrom whether the plaintiff is suing for the redress of the wrong done him individually or the wrong done the corporation.

5.

The said complaint is uncertain in that there is contained therein the language quoted and set out in the ground of demurrer last above stated in that it is uncertain whether the plaintiff is suing to redress a wrong done to him individually or to redress a wrong done to the corporation mentioned.

6.

The said complaint is further demurred to upon the ground that the same is uncertain in this: In said complaint the following language occurs: "but wholly disregarding the same and contriving together to injure and deceive the said corporation, neglected
39 and omitted, without any reasonable excuse, to exercise their own skill, care, judgment and discretion in the making of loans and discounts out of the moneys in the possession of the said bank and otherwise directing the business of said bank, but they negligently permitted the cashier of said bank to control and manage the whole business of said bank as he saw fit, and without consulting or in anywise informing said defendants or any or either of them, to lend the moneys of the said bank according to his own pleasure, to buy bills of exchange without any consultation with said defendants or any or either of them, and in such manner as he, the said cashier, elected, to dispose of all the moneys of said bank, and the said cashier, of his own will and without direction or attempted direction of or by said defendants or any or either of them lent out of the moneys of said bank large sums of money to divers irresponsible persons with no adequate security & bought unauthorized, unsecured & valueless bills of exchange, & on informal promises & pretended securities which were of little or no value, & such as were not usual in bank dealing nor capable of discount nor well approved in banking securities nor safe securities for any bank to take, or well adapted to preserve the capital stock
40 thereof; all of which said loans, notes, drafts & bills of exchange were and are wholly valueless & unpaid & cannot in anywise be realized upon."

"That by such negligence, worthless loans & the various transactions above mentioned the moneys of the corporation were wasted, misused & lost, as this plaintiff is informed & believes & on his information & belief alleges, at the time of the failure of the bank hereinafter referred to, to a sum & amount of about $200,000 that

to this plaintiff the entire details of the misuse of the money of the bank are unknown."

That it is uncertain therefrom what worthless loans or transactions resulted in a loss to the said bank of the sum of $200,000 in that no designation of amounts of the respective losses of the persons to whom such loans were made or by which such losses were sustained is stated therein. The said language is further uncertain in that it cannot be told therefrom what act the defendants contrived together to do or omit to do in order to deceive or injure the said corporation.

41

7.

The said complaint is demurred to upon the grounds that the same is uncertain in this. In said complaint is contained this language: "That by divers other like careless, unbusinesslike and improvident loans & transactions the said cashier misused & lost divers other sums of money belonging to the bank amounting in the aggregate to about $50,000 more." That said language is uncertain in that it cannot be told therefrom what such other like careless, unbusinesslike or improvident loans or transactions had by the said cashier resulted in such loss of $50,000 and such matter is not stated with such certainty as will enable these defendants to answer the same.

8.

The said complaint is further demurred to upon the ground that the same is uncertain in this: It is alleged in the said complaint that by reason of the negligence of the defendants the corporation bank lost the sum of $400,000 but there is only stated the particulars of the losses mentioned, Woodard, Gutman, Wickam, Snow, Cochran and Chown losses, which as stated do not aggregate

42 the sum which it is alleged the bank lost by reason of such negligence.

9.

The said complaint is demurred to upon the ground that the same is unintelligible in this: It cannot be told therefrom upon what state of facts plaintiff claims that these defendants are liable for any other loss sustained by said bank other than those enumerated in the seventh ground of demurrer last above stated. It is further unintelligible in that there is alleged a loss of from 20 to 30 per cent. of the assets of the bank by reason of the receiver being compelled to promptly realize such assets, and there is no allegation in anywise connecting these defendants with such conduct on the part of the receiver, nor is it made intelligible or shown upon what facts these defendants are to be held liable for such loss.

10.

Said complaint is further unintelligible in this: That it is stated therein that the controller in order to pay the debts of the bank

levied an assessment of $75,000 upon the stockholders, and
43 yet there is no allegation connecting these defendants with such act so as in anywise to make them liable therefor.

11.

Said defendants further demurs to all that part of the said amended complaint which predicates the cause of action upon any losses sustained by the said bank other than those losses specified as the Woodard, Gutman and Wickam losses upon the ground that all of such cause or causes of action are barred by the provisions of section 339, subdivision one, of the Code of Civil Procedure of this State, and in that said amended complaint was not filed within two years after such causes of action accrued.

Wherefore said defendants ask that plaintiff take nothing by his complaint and that defendants have judgment for costs.

BYRON WATERS,
Attorney for Defendant R. R. Thompson.

Filed Jan'y 21, 1893.

44 *Order Overruling Demurrers.*

(Title of Court and Cause.)

IN OPEN COURT, *May* 5, *A. D.* 1893.

In this action the demurrer of the defendants R. R. Thompson, Robert A. Wilson, R. P. Thomas and The California National Bank having been heretofore submitted to the court for consideration and decision and the court having fully considered the same—

It is ordered that said demurrers be and the same are hereby overruled, and said defendants are allowed ten (10) days to answer.

Answer of Defendants Thompson and Wilson.

(Title of Court and Cause.)

The defendants, Robert R. Thompson and Robert A. Wilson for answer to the amended complaint of the plaintiff, show:

Said defendants deny, that at any time *that* as such execu-
45 tive committee or as members thereof, either assumed or had any other supervision of any of the officers or business of said corporation than that imposed upon them by the terms of section 7 of the by-laws of said bank and set out in the amended complaint herein.

Said defendants deny that there ever devolved upon them as members of said executive committee, or that they ever assumed any duty to discount or purchase bills, notes or evidences of debt, or to buy or sell bills of exchange, coin or bullion or loan money on any security or to order, direct or superintend*ent* the acts or proceedings of the cashier, clerks or other employees of said bank or to exercise vigilance in seeing that money or property of the bank were not lost, wasted or misused or to conduct the business of

the corporation at all, or in any such matters to exercise their skill or discretion, or to cause records or books of account to be kept, or to examine them or vouchers, or to see that the moneys of the bank were not lent to irresponsible persons or upon inadequate security, or upon security not conforming to bank usage or otherwise irregular or to see that in the purchase of bills of exchange or
46 drafts, the same were secured or safe or sure to be honored or paid, or to see that any such loans conformed to bank usage or the rules of safe banking, except as required by said by-law 7.

Said defendants deny that there was ever imposed upon them as such executive committee, or that they as such or at all ever assumed any duty to exercise any other diligence or fidelity in the performance of any duty to said bank, other than that provided for in section 7 of the by-laws of the bank.

Said defendants deny that either of them either accepted or retained or assumed any trust or duty unto the said corporation other than those imposed by the terms of said section 7 of the by-laws, or that they or either of them promised to discharge any other duty or perform any other act or thing in the premises as members of said executive committee other than those duties imposed upon them by the terms of said by-laws.

And said defendants deny that the said corporation ever confided in said defendants as members of the said executive commit-
47 tee or entrusted unto them the performance or discharge of any other duties as such executive committee than those duties specified in said section 7 of the by-laws of the said corporation.

That at the same time section 7, 17 and 18 of the by-laws of the said banking corporation were adopted ,there was also adopted as section 19 of such by-laws, a by-law fixing the powers and duties of the cashier of the said banking corporation, which is as follows, to wit:

SEC. 19. "The cashier shall keep a record of all proceedings of meetings of the directors and stockholders. He shall, when requested by the president or two directors, cause notices to be given of all meetings of the board of directors and of the stockholders. He shall countersign all certificates of stock, all receipts for circulating notes received from the Comptroller of the Currency; he shall promptly and accurately prepare and forward all reports and perform all acts required by the laws of the United States or regulations of the Treasury Department. He shall sign or countersign, and when necessary affix the seal of the bank to all contracts, deeds, evidences of debt and other instruments in writing which
48 are necessary and proper in the transaction of the ordinary business of the bank, or which have been approved by the board of directors and do all acts required by said board. He may under the direction and with the concurrence of the president discount bills, notes or other evidences of debt and make loans under the same restrictions as the president; issue and sign certificates of deposit; draw checks and warrants upon the bank in the ordinary

and usual course of its business and pay the current expenses of the bank when approved by the executive committee. He shall keep the stock certificate book and transfer book and see that the proper entries are made therein. He shall also have supervision and custody of all records, minutes, papers, books, vouchers, notes, bonds, evidences of indebtedness, and securities of the bank, unless otherwise specially directed by the board of directors; and shall be responsible for all moneys, funds, and valuables belonging to or deposited with the bank, and shall account for and deliver the same upon the order of the board of directors, or to any person authorized to receive them. He shall make such statements of the condition finances and business of the bank to the directors and
49 stockholders as may from time to time be required of him by the president or board of directors. He shall give bond with security to be approved by the board of directors, in the sum of ten thousand dollars for the faithful discharge of his duties."

And at the same time there was adopted by said corporation another by-law, authorizing the appointment of an auditing committee, and defining its duties, which by-law is numbered section 24 and is as follows, to wit:

SEC. 24. "There shall be appointed by the board of directors a committee of three members whose duty it shall be to examine at such time as they shall see fit, but as often as every three months, the affairs of the bank, count its cash and compare its assets and liabilities with the accounts of the general ledger, ascertain whether the accounts are correctly kept and the condition of the bank corresponds therewith and whether the bank is in a sound and solvent condition and to recommend to the board such changes in the manner of doing business and otherwise as shall seem to be de-
50 sirable: the result of the examination shall be reported to the board at its next regular meeting thereafter."

That from and after the adoption of said by-laws so prescribing the duties of the respective officers and committees of the said banking corporation, each of the said officers and committees assumed and during the continuance of the operation and doing of business by the said bank as such, each of the said officers and committees took upon themselves and entered upon the discharge of the duties imposed upon them respectively by the law and such by-laws.

Said defendants deny that they or either of them ever contrived together or with any person in anywise to injure or deceive the said corporation or that they or either of them ever neglected or omitted to exercise their or his own skill, care, judgment or discretion in the making of loans or discounts of the moneys of said corporation or in anywise directing the business of said bank, or that they or either of them ever permitted the cashier of said bank to control or in anywise manage any of the business of said bank, and said defendants and each of them deny that they permitted said
51 cashier without consulting or informing them or either of them to lend any of the moneys of said bank according to his pleasure, or to buy bills of exchange without any consultation with said defendants or either of them or in any manner to dispose

of any moneys of the said bank of his own will or without direction or attempted direction of or by said defendants.

And said defendants upon information and belief deny that the said cashier let out any of the moneys of the said bank to any irresponsible persons upon inadequate security, or bought any unauthorized or unsecured or valueless bills of exchange, or upon informal promises or pretended securities, or such as were of little or no value, or such as were not usual in bank dealing or that any of said loans, notes, drafts or bills of exchange were wholly valueless.

Said defendants deny that there was any waste, misuse or loss of any of the funds or moneys of the said corporation by or through any negligence of either of these defendants, and they deny that any loss or waste or misuse of any of the funds of said bank were ever caused by any act done or omitted to be done by these defendants or either of them.

52 For answer to that part of the amended complaint, which relates to the transactions and dealings had between said bank and the Alameda County Railway Company and J. H. Woodard, said defendants, on information and belief, deny that said Daniel McAwley was a man of no capital or was not of good financial standing or that said drafts were unsecured or that the drawee thereof had no credit or means or standing commensurate with the amount of said drafts, or that to buy them was injudicious or inconsistent with banking principles or reckless or wrong.

Said defendants deny that any loss accruing to the said bank by reason of any of the said transactions with the said Woodard or said railway company, was in anywise caused by any negligence on the part of either of these defendants.

Said defendants on information and belief deny, that any moneys of the said bank advanced to David Gutman upon the discount of any drafts were not secured to be repaid to the said bank, and said defendants deny that any loss sustained by said bank by reason thereof was in anywise caused by any negligence on the part of either of these defendants.

53 Said defendants on information and belief deny, that at the time when the claim of said bank against D. C. Wickam accrued, that the said Wickam was a man of no financial credit, or that he was of bad repute or had a known criminal record, and deny that any claims of said bank against said Wickam were unsecured for any part thereof.

Said defendants deny that any loss sustained by said bank, through or by reason of any claims against said Wickam, was in anywise caused by any negligence or omission on the part of either of these defendants.

The said defendants state that they have no information or belief upon the subject sufficient to enable them or either of them to answer that allegation of the complaint that "by divers other careless, unbusinesslike and improvident loans and transactions, the said cashier misused and lost divers other sums of money belonging to the bank amounting in the aggregate to about fifty thousand dollars more," and placing their denial on that ground, said defend-

ants deny that by any careless, unbusinesslike or improvident loans or transactions, the said cashier misused or lost any other sum or sums of money belonging to the bank.

54 As to the transaction by said bank with J. V. Chown, the said defendants on information and belief deny that any sum of money was obtained by the said Chown from the bank without adequate security or that any loss through such transaction sustained by the bank was in anywise caused by any act or negligence on the part of these defendants or either of them.

As to the transaction with J. T. Cochran & Co., mentioned in the complaint as the transaction of J. T. Cochran, said defendants on information and belief deny that the said Cochran was not a man of good credit or commercial standing, or that he obtained by or through any improvident or unbusinesslike transactions with the cashier, any sums or sum of money.

Said defendants on information and belief allege that all sums of money obtained by said Cochran or Cochran & Co., from the said cashier, were adequately secured to be repaid to the said bank; and said defendants deny that any loss accruing to the said bank by reason of the transactions with the said Cochran or Cochran & Co., was caused by any negligence on the part of these defendants or either of them.

55 Said defendants on information and belief deny that R. W. Snow, mentioned in the complaint was a man of no capital or of no good financial rating, or that any transactions that took place between said Snow and the cashier of the bank were improvident transactions.

Said defendants on information and belief, deny, that the said Snow was a man of no capital or of no good financial rating, or that any loss sustained by said bank through any transaction with him was in anywise caused by any negligence on the part of these defendants or either of them.

Defendants on information and belief, deny, that any losses resulting from the transactions of the bank with said Wickam, Snow, Cochran or Chown or Woodward or Gutman, or the Alameda County Railway Company, or Cochran & Company were caused by any negligence on the part of said executive committee or either of these defendants.

Said defendants deny that by the exercise of any care they could, or that by the exercise of ordinary care they would have pre-

56 vented the occurrence of said uses of the moneys of the bank, or that by the giving of any attention to or the discharging of the duties of their office, any of such uses would not have occurred, or that had they done so, any of said losses or uses of money would not have occurred. And said defendants deny that they neglected any duty in the premises, or neglected to take care or exercise supervision of the officials or business of the bank or that they or either of them permitted the cashier to do as he pleased, or misuse or waste or lose the moneys of the bank, or that by reason of any negligence or omission on their part or on the part of either of them, any loss to the said corporation occurred.

Said defendants deny that any of the surplus profits that had accumulated were lost by reason of any negligence on the part of either of these defendants; and said defendants deny that said bank failed or became insolvent, or closed its doors or stopped doing business by reason of any negligence on the part of either of these defendants or by reason of any act of misconduct of the cashier permitted by these defendants or either of them.

Wherefore, defendants ask judgment that plaintiff take
57 nothing, and said defendants have judgment for their costs of suit.

BYRON WATERS,
Attorney for Defendant Robert R. Thompson.
MASTICK, BELCHER & MASTICK,
Attorneys for Defendant Robert A. Wilson.

Duly verified.
Filed June 9, 1893.

Stipulation

That answer of defendants Thompson and Wilson stand as the answer of defendants Thomas and the Cal. Nat. Bank of San Francisco.

(Title of Court and Cause.)

It is hereby stipulated that the answer of the defendants Robert R. Thompson and Robert A. Wilson to the last amended complaint of said plaintiff be deemed to be, stand for and be used as the joint and several answer of said last-named defendants and said above-named defendants in said cause, Richard P. Thomas and
58 The California National Bank of San Francisco, the same as if a verified answer had been served & filed by said defendants Richard P. Thomas and The California National Bank of San Francisco, and each of them, to said last-amended complaint of said plaintiff.

Dated June 12, A. D. 1893.

THOMPSON & THOMPSON,
Att'ys for Pl'ff.

Filed June 14, 1893.

Order of Judgment.

(Title of Court and Cause.)

APRIL 27, 1894.

This cause having been heretofore submitted to the court for consideration and decision and taken under advisement and the court having fully considered the same and being fully informed,

It is ordered by the court that judgment be and the same is hereby entered in favor of the plaintiff and against the defendants Richard P. Thomas, Robert R. Thompson and Robert A.
59 Wilson and in favor of the other defendants herein, and inasmuch as the testimony is unsatisfactory and the court

being unable therefrom to determine the amount for which judgment should be entered,

It is ordered, by the court, that a referee be appointed to take proof on that subject and report to the court (memorandum of opinion filed).

On behalf of all the defendants Messrs. George H. Maxwell and H. D. Talcott in open court duly except to the order referring said matter to the referee.

Order Appointing Referee.

(Title of Court and Cause.)

Whereas after a trial of the above case and the submission thereof for decision the court finds itself in need of further information upon certain issues of said case,

And whereas the taking of an account is necessary for the guidance and information of the court before rendering a final
60 judgment therein, the court hereby appoints T. C. Kierulff, Esq., referee in said case for the following purpose, to wit:

To examine the books, papers, drafts & documents of the California National bank introduced in evidence at the trial of said case for the purpose of ascertaining therefrom & reporting to the court the amount appearing from said books, papers, drafts & documents to have been due and owing to the bank on July 8, 1888, Aug. 6, 1888, and Dec. 15, 1888 from each of the following-described persons, to wit: David Gutman, J. H. Woodward, president of the Alameda County railroad, and D. C. Wickam.

D. J. MURPHY, *Judge.*

June 14th, 1894.

Filed June 15, 1894.

Report of Referee.

(Title of Court and Cause.)

61 Whereas on the 14th day of June, 1894, in the city and county of San Francisco, State of California, the court made an order appointing me, the undersigned, referee in the above-entitled case, which order was in the words and figures following, to wit:

Whereas, after a trial of the above case, and the submission thereof for decision, the court finds itself in need of further information upon certain issues of said case.

And whereas, the taking of an account is necessary for the guidance and information of the court before rendering a final judgment therein, the court hereby appoints T. C. Kierulff Esq. referee in said case for the following purpose to wit: to examine the books, papers, drafts and documents of the California National bank introduced in evidence, at the trial of said case for the purpose of

ascertaining therefrom and reporting to the court the amount appearing from said books, papers, drafts and documents, to have been due and owing to the bank on July 8, 1888, August 6th, 1888 and December 15th 1888, from each of the following-described persons, to wit: Davis Gutman, J. H. Woodward, president
62 of the Alameda County Railroad Company, and D. C. Wickham.

June 14th, 1894.

D. J. MURPHY, *Judge.*

Now, therefor-, in pursuance to the aforesaid order, I do now respectfully report to this honorable court, as follows:

That I have fully and carefully examined the books, papers and documents of said bank, in reference to the indebtedness, upon the dates, and of the persons described in said order.

That I have been attended upon said examinations, by Messrs. Thompson & Thompson, E. S. Pillsbury, att'ys for plaintiff,—and by Messrs. George H. Maxwell and Mastick, Belcher & Mastick, att'ys for defendants.

That it appears from the books, papers and documents of the said California National bank, that the said David Gutman, J. H. Woodard, president of the Alameda County Railroad Co., and D. C. Wickham, the persons described in the order of reference aforesaid,
63 were indebted to the said California National bank, upon the dates therein mentioned, in the following amounts, to wit:

David Gutman, indebtedness July 8, 1888.....	$127 08
" " August 6, 1888.....	4,566 93
" " December 15, 1888.....	70,622 49
J. H. Woodard, president, indebtedness, July 8, 1888..	10,052 54
" " president, indebtedness, August 6, 1888.	30,000 00
" " president, indebtedness, December 15, 1888	75,385 00
D. C. Wickham, indebtedness July 8, 1888.....	19,793 96
(Time, paper maturing after July 8, 1888.....	16,310 50)
D. C. Wickham, indebtedness August 6, 1888	42,939 28
" " " December 15, 1888.....	51,085 42

All of which is respectfully submitted.

T. C. KIERULFF, *Referee.*

August 17, 1894.
Filed Aug. 17, 1894.

Stipulation as to Defendant Thompson.

(Title of Court and Cause.)

64 The above-named plaintiff John Chetwood, Jr., in person and by his attorneys Messrs. Thompson & Thompson and E. S. Pills-ury, Esquire, and the defendant R. R. Thompson by his attorneys George H. Maxwell, Esquire, and Byron Waters, Esquire, hereby stipulates and agree:

First. That the said plaintiff hereby renounces and withdraws his cause of action herein as against the said defendant R. R. Thompson, and that he will not further prosecute the same as against said defendant.

Second. That pursuant to the foregoing renunciation and withdrawal by the plaintiff of his said cause of action, this action be and is hereby dismissed as against the said defendant R. R. Thompson.

Third. That the said plaintiff and the said defendant each pay his own costs incurred and disbursed in this action, and that judgment of dismissal be accordingly entered herein.

Dated, September 13th, 1894.

JOHN CHETWOOD, JR.,
Plaintiff, in Person.

65 THOMPSON & THOMPSON,
E. S. PILLSBURY,
Attorneys for said Plaintiff.
GEO. H. MAXWELL AND
BYRON WATERS,
Attorneys for Defendant R. R. Thompson.

Filed Sept. 24th, 1894.

Stipulation as to Defendant Wilson.

(Title of Court and Cause.)

The above-named plaintiff John Chetwood, Jr., in person, and by his attorneys, Messrs. Thompson & Thompson, and E. S. Pillsbury, Esquire, and the defendant Robert A. Wilson by his attorneys Mastick, Belcher and Mastick, hereby stipulate and agree:

First. That the said plaintiff hereby renounces and withdraws his cause of action herein as against the said defendant Robert A. Wilson and that he will not further prosecute the same as against said defendant.

66 Second. That pursuant to the foregoing renunciation and withdrawal by the plaintiff of his said cause of action, this action be and is hereby dismissed as against the said defendant Robert A. Wilson.

Third. That the said plaintiff and the said defendant each pay his own costs incurred and disbursed in this action, and that judgment of dismissal be accordingly entered herein.

Dated Sept. 13th, 1894.

JOHN CHETWOOD, JR.,
Plaintiff, in Person.
THOMPSON & THOMPSON AND
E. S. PILLSBURY,
Attorneys for said Plaintiff.
MASTICK, BELCHER & MASTICK,
Attorneys for Defendant Rob't A. Wilson.

Filed Sept. 24th, 1894.

Order of Judgment of Dismissal as to Defendants Thompson and Wilson.

(Title of Court and Cause.)

67 The plaintiff John Chetwood, Jr., and the defendants Robert R. Thompson and Robert A. Wilson come into court by their respective attorneys and on motion of the attorneys for the plaintiff, the attorneys for said defendants respectively, consenting thereto, and pursuant to the stipulation signed by the plaintiff in person and by the attorneys for the respective parties, plaintiff and said defendants, now filed in open court by the attorneys for the plaintiff, wherein and whereby the plaintiff renounces and withdraws his cause of action herein as against the said defendants Robert R. Thompson and Robert A. Wilson, and wherein and whereby it is stipulated and agreed that this action be dismissed, as to them and each of them each of said parties paying his own costs,

Now, therefore, it is hereby ordered by the court that this action be and the same is hereby dismissed as against said defendants Robert R. Thompson and Robert A. Wilson, each of said parties paying his own costs, and that judgment of dismissal be entered herein accordingly.

Filed and entered Sept. 24th, 1894.

68 *Judgment of Dismissal as to Defendants Thompson and Wilson.*

(Title of Court and Cause.)

The plaintiff, John Chetwood, Jr., having on this 24th day of September, 1894, by his attorneys, filed in open court stipulations signed by himself in person and by his attorneys, and by the attorneys for the defendants Robert R. Thompson and Robert A. Wilson, respectively, therein and thereby renouncing and withdrawing his cause of action herein, as against the defendants Robert R. Thompson and Robert A. Wilson and each of them, and agreeing that, pursuant to such renunciation and withdrawal, this action should be dismissed as against the said defendants Robert R. Thompson and Robert A. Wilson and that each of the parties, said plaintiff and said defendants, should pay his own costs; and the court, pursuant to said stipulations, and on motion of the attorneys for the plaintiff made in open court, having ordered, on said day, that this action should be and was thereby dismissed as against the said defendants Robert R. Thompson and Robert A. Wilson, and that each of the said parties should pay his own costs.

69 Now, therefore, by reason of the law and the premises, it is hereby considered, ordered and adjudged by the court that this action be and the same is hereby dismissed as against the defendants Robert R. Thompson and Robert A. Wilson and each of them, and that the said plaintiff and the said defendants each pay his own costs incurred and disbursed in this action.

Dated, this 24th day of September, 1894.

Judgment recorded September 24, 1894.

Book 23, page 191.

Findings.

(Title of Court and Cause.)

This cause being duly called for trial, Messrs. Thompson & Thompson and E. S. Pillsbury, Esq., appeared as counsel for plaintiff and Messrs. Mesick & Waters & Maxwell,—Messrs. Mastick, Belcher & Mastick,—and H. D. Talcott, Esq., and A. R. Cotton, Esq., as counsel for the various and respective defendants. And the court having heard all the evidence offered by the parties and duly considered the same and the report of the referee herein and list-
70 ened to the arguments of the respective counsel in the case. And the case having been duly submitted to the court for decision, the court now makes its

Finding of the Facts.

1.

The California National Bank of San Francisco, about the 20th day of October, A. D. 1886, became, it ever since then has been and it now is a national banking corporation, duly organized and existing under the laws of the United States, having a fully paid-up capital stock of two hundred thousand dollars.

At the date of its said organization, the plaintiff—John Chetwood, Jr.—became, he ever since then has been, and he now is a stockholder of and in said bank and in said corporation.

At the said date of its organization, a board of seven directors was duly elected by the stockholders thereof and said seven directors duly accepted office and became the board of directors of said bank and of said corporation.

71 The defendant, Richard P. Thomas was one of the seven directors so elected and he remained and was such director throughout all of the time thereafter herein mentioned.

By the articles of association of said corporation it was duly provided that the board of directors thereof should elect a president, and vice-president and adopt a code of by-laws for the management of said bank.

2.

On said date, the board of directors and the said corporation duly adopted a code of by-laws for said corporation, and the said code of by-laws remained in full force throughout all of the time herein mentioned. Said code of by-laws was in sections which were consecutively numbered. Sections Nos. 7, 17, 18, 19 and 24 were as follows, to wit:

"SEC. 7. There shall be appointed by the board of directors a committee to be known as the executive committee consisting of the president, the vice-president and one or more directors to continue to act till succeeded, who shall have and exercise immediate

supervision of all of the officers and business of this bank:
72 who shall audit all bills for current and other expenses; who shall have power to discount and purchase bills of exchange, coin and bullion, and loan money on personal security; and who shall at each regular meeting of the board of directors make a report of all bills, notes, and other evidences of debt, and to buy and sell bills of exchange, coin and bullion, and loan money on personal security, and who shall at each regular meeting of the board of directors make a report of all bills, notes and other evidences of debt discounted or purchased by them for the bank, and of current and other expenses audited since their last previous report.

SEC. 17. The president shall have general control, and supervision of the affairs of the bank; he shall sign all certificates of stock, all receipts for circulation notes received from the Comptroller of the Currency and shall also have authority to sign all contracts, evidences of debt and other instruments proper and necessary in the ordinary course of business of the bank or which have been approved by the board of directors. He shall have power and authority to discount bills, notes, or other evidences of debt and make loans not exceeding ten thou-
73 sand dollars to any single individual, firm or corporation; buy and sell exchange, sign certificates of deposit and draw warrants and checks upon the bank. He shall be responsible for all sums of moneys and personal property of every kind which may be entrusted to his care or come under his control as president; and he shall pay over the same and deliver the same upon the order of the board of directors, or to any person who may be authorized to demand and receive the same. He shall call special meetings of the board of directors and of the stockholders whenever the interests of the bank shall require, or whenever requested by two directors. He shall perform all duties required of him by the banking laws of the United States, or by its proper officers, and shall see that all reports are promptly and accurately made and forwarded. He shall give bond in the sum of ten thousand dollars, with security to be approved by the board of directors for the faithful discharge of his duties. He shall also prepare and present to the stockholders at their annual meeting such a statement of the property and business of the bank for the preceding year, as will enable them to understand fully the financial
74 condition and prospects of the bank. He shall also have the supervision of all employees of the bank and may suspend them when necessary, reporting his action and the occasion thereof to the board of directors, at its next meeting.

SEC. 18. The vice-president shall assist the president in the discharge of his duties, and in the absence or inability of the president, he shall perform all the acts, exercise all the powers and be subject to the same liabilities as that officer. He shall give bond in the sum of ten thousand dollars, with security to be approved by the board of directors, for the faithful discharge of his duties.

SEC. 19. The cashier shall keep a record of all proceedings of meetings of the directors and stockholders. He shall, when re-

quested by the president or two directors, cause notices to be given of all meetings of the board of directors and of the stockholders. He shall countersign all certificates of stock, all receipts for circulating notes received from the Comptroller of the Currency; he shall, promptly and accurately prepare and forward all reports, and perform all acts required by the laws of the United States, or
75 regulations of the Treasury Department. He shall sign or countersign and when necessary, affix the seal of the bank to all contracts, deeds, evidences of debt and other instruments in writing which are necessary and proper in the transaction of the ordinary business of the bank, or which have been approved by the board of directors and do all acts required by said board. He may under the direction and with the concurrence of the president, discount bills, notes or other evidences of debt and make loans under the same restrictions as the president; issue and sign certificates of deposit; draw checks and warrants upon the bank in the ordinary and usual course of its business and pay the current expenses of the bank when approved by the executive committee. He shall keep the stock-certificate book and transfer book and see that the proper entries are made therein. He shall also have supervision and custody of all records, minutes, papers, books, vouchers, notes, bonds, evidences of indebtedness and securities of the bank unless otherwise specially directed by the board of directors; and shall be responsible forlall moneys, funds and valuables belonging to or
76 deposited with the bank, and shall account for and deliver the same upon the order of the board of directors, or to any person authorized to receive them. He shall make such statements of the condition, finances and business of the bank to the directors and stockholders as may from time to time be required, by the president or board of directors, of him. He shall give bonds with security to be approved by the board of directors in the sum of ten thousand dollars, for the faithful discharge of his duties.

SEC. 24. There shall be appointed by the board of directors a committee of three members, whose duty shall be to examine at such time as they shall see fit, but as often as every three months the affairs of the bank, count its cash and compare its assets and liabilities with the accounts of the general ledger, ascertain whether the accounts are correctly kept and the condition of the bank corresponds therewith and whether the bank is in a sound and solvent condition and to recommend to the board such changes in the manner of doing business and otherwise as shall seem to be desirable; the result of the examination shall be reported to the board at its next regular meeting thereafter."

77 3.

Upon organization of the board of directors, said board duly proceeded to the election of officers, and defendant, Richard P. Thomas, was elected president and Robert A. Wilson, vice-president, and they remained and were such officers during and throughout all the time hereinafter mentioned.

As president of said corporation and of said bank, said Richard

P. Thomas immediately upon and after the organization aforesaid, assumed and entered upon the discharge of the duties of his said office and, in accordance with said code of by-laws, and specially in pursuance of section seventeen thereof above recited and prescribing his duties as such president, he the said Richard P. Thomas, took, assumed and had general control and supervision of the affairs of the bank, with authority and power as set forth in said by-laws, and on him devolved the duty of seeing that the money of said bank was not wasted or misused, and to use his own skill, and discretion in conducting the affairs and business of the bank.

He was, for his services allowed and paid a regular salary
78 during and throughout all of the time of his incumbency of said office. He was well aware of the nature of said trust, the duties of his said office so as aforesaid imposed on him by said by-laws and accepted said duties and received said salary with full knowledge in the premises.

Said corporation and said board of directors fully relied on and confided in his fidelity and diligence and, so relying and confiding, said corporation and its board of directors entrusted him, the said Richard P. Thomas, with the charge of said bank and the duties aforesaid as president, under said by-laws and their above-recited provisions.

Under direction and supervision of said defendant Richard P. Thomas as president, the business of the bank was begun and for a time properly conducted and the bank accumulated a surplus fund of $30,000, over and above its $200,000 capital; but for a considerable period of time prior to the report of the auditing committee hereinafter mentioned, said defendant, Richard P. Thomas, omitted without any reasonable excuse to give reasonable care and
79 attention to the duties of his office and permitted the cashier to manage the business of the bank as he saw fit, without information to or consultation with said president.

Under said by-laws as above shown, provision was made for an auditing committee consisting of three directors whose duty was to examine and report at least once in every three months to said board of directors the general condition of the bank and to recommend to the board such changes in the manner of doing business and otherwise, as shall seem desirable. Upon the organization of said board and adoption of said by-laws, the auditing committee was duly elected.

Prior to July 8th, 1888, said auditing committee examined the condition of the bank, bringing forward its various accounts to the end of the quarter ending June 30th, 1888, and made a report in writing, to said board, duly signed by all the members of said auditing committee; said report being dated July 8th, 1888, and filed on the 6th day of August, 1888. While said report was in the course of being prepared, many warnings of the condition of the bank were orally given to the president, the
80 said Richard P. Thomas. In and by said report it was charged that large loans and discounts had been made which were unauthorized and improper; that the president professed to

have no knowledge of the daily transactions of the bank nor supervision of its affairs; that the vice-president found himself overruled and powerless, while the cashier absorbed the functions of the president and that the auditing committee in the course of its examination had seen enough to cause it to fear that very considerable losses were likely to occur from failure to observe the safes rules carefully laid down in the by-laws for the conduct of business, losses which might otherwise be avoided.

5.

The attention of said president, the defendant herein Richard P. Thomas, was duly drawn to said report and matters therein commented on at and for a considerable time before its date; but he, the said defendant Richard P. Thomas, president as aforesaid still neglected and omitted without any reasonable excuse to exercise his skill, care, judgment or discretion in the conduct of the bank's business and neglected to give reasonable and proper attention thereto but negligently permitted the cashier to manage the
81 business of the bank without the knowledge or direction of or consultation with him, the defendant Richard P. Thomas, president as aforesaid; and to loan the moneys of the bank according to his own pleasure and particularly to make the loans hereinafter specified and to buy bills of exchange on insufficient security and in such manner as he saw fit to dispose of the moneys of said bank without the knowledge of him, the said president, or of said executive committee, or of any or either of its members. By reason of said neglect of the president, the said cashier, without the direction or attempted direction of the president, vice-president, executive committee or any or either of them, loaned out the moneys of the bank in large sums to divers irresponsible persons with no adequate security, and bought unsecured and valueless bills and notes and made loans on informal promises and pretended securities of little or no value. By said negligence of the said president, the defendant Richard P. Thomas, worthless loans and transactions, the moneys of the bank were wasted and lost and the said losses caused the failure of the bank hereinafter mentioned.

82 8.

One of the improper uses of said moneys was as follows, to wit: One J. H. Woodard representing a corporation known as the Alameda County Railroad Co. had dealings with the bank through said cashier. Neither the said Woodward nor his corporation were of any financial standing, reputation or possessed property, as was well known to said president. He the said president on several occasions had been cautioned against said Woodard because of his unreliability. He the said Woodard offered to said cashier, at different times between May 7th, 1888, and the failure of said bank, his drafts to a large amount on one Daniel Macauley who was a person of no financial standing; said drafts were not secured; to buy said drafts was entirely inconsistent with banking principles

reckless and wrong, but the said cashier bought said drafts, these drafts were dishonored and not paid and by reason of the premises, the bank lost $68,500.

9.

Another improper use of the bank's funds was as follows, to wit:
One David Gutman, who was also a person of no good financial standing, as was well known to the defendant Richard P. Thomas, who had been warned against him as an unsafe borrower, offered the said cashier his drafts for large sums, in the aggregate $67,000. The drawee was irresponsible, said drafts were dishonored, and they were dangerous and the purchase thereof was inconsistent with good banking, but the cashier bought them. They were dishonored, only $15,000 could be realized upon them and the balance due thereon was entirely lost to the bank.

10.

Another improper use of the bank's funds was as follows, to wit: One D. C. Wickham who was not only a person of no financial standing, but was of notoriously bad repute,—and of whose financial standing and that he was not a safe or proper man to loan money to, said president of the bank, the above-named defendant, Richard P. Thomas, was warned,—borrowed of the bank by connivance with the cashier, divers large sums of money on promissory notes, overdrafts, drafts and acceptances to the amount aggregating more than $45,000. Almost all of the indebtedness of said Wickham was unsecured and no considerable part of said indebtedness could be recovered and the bank lost by these transactions about $45,000.

11.

By reason of the said losses, and the lack of ready money to meet demands of depositors, the bank, on the 15th of December 1888, suddenly failed, closed its doors went into liquidation and lost its entire capital stock amount, to wit, the sum of two hundred thousand dollars and its accumulated surplus fund of thirty thousand dollars, and by reason of necessity of more money in the hands of the receiver, afterwards with which to pay debts of the bank in liquidation, the said corporation lost the further sum of fifty-five thousand dollars, assessed on the stockholders and from them collected, through assessment by the receiver and the Comptroller of the Currency as is hereinafter recited.

12.

It appears from the books, papers and documents of said bank,—to which the said president, the defendant Richard P. Thomas, had full constant access,—that the said David Gutman, J. H. Woodard, president of the Alameda County Railroad Company,—and D. C. Wickham, the parties above named were respectively indebted to the said bank upon the several debts herein

mentioned in connection with the report of the auditing committee, as follows, to wit:—

David Gutman, indebtedness—July 8, 1888.....	$127 08
" " " Aug. 6, 1888.....	4,566 93
" " " Dec. 15, 1888.....	70,622 49
J. H. Woodard, pres. &c. indebtedness July 8, 1888..	10,052 54
" " " pres. &c. indebtedness Aug. 6, 1888..	30,000 00
" " " pres. &c. indebtedness Dec. 15, 1888..	75,385 00
D. C. Wickham, indebtedness July 8, 1888..... ..	19,793 96
(Time, paper maturing after July 8, 1888.....	16,310 50)
D. C. Wickham, indebtedness Aug. 6, 1888..	42,939 28
" " " indebtedness Dec. 15, 1888.....	51,085 42

13.

Said president easily could have prevented all of the said improper uses of money by discharging the duties of his said trust, and had he done so, said losses would not have occurred, said drafts would not have been bought and said loans would not have been made, but said president, the defendant Richard P. Thomas, entirely ignored and neglected his duties, negligently per-
86 mitted said cashier to do as he pleased with, to misuse, waste and lose the said moneys of the bank, and by reason of the aforesaid negligence of said president and said action of the cashier, so negligently permitted, and the said losses of money resulting therefrom and from lack of moneys which but for the said losses, would have been available; the said bank suddenly failed on the 15th day of December, 1888, and became insolvent; its capital and accumulated funds were wholly lost and it closed its doors, suspended and stopped doing business and the assessment hereinafter mentioned was levied on the stockholders thereof.

14.

At the time of said failure, the corporation in its banking business owed large sums of money, in the aggregate amounting to about $450,000, to divers persons who had been and at the time of said failure were, depositors of money in said bank.

15.

The amount of the actual loss to the corporation—on the three items, in finding No. twelve hereof mentioned,—between the
87 date of the auditing committee's report and that of the failure of the bank,—was the sum of one hundred and sixty-six thousand nine hundred and nineteen,—($166,919) dollars.

16.

From the defendants Robert R. Thompson and Robert A. Wilson—of, for and on account of said loss,—there has, in this action been collected the sum of twenty-seven thousand five hundred,—

($27,500) dollars; leaving a net loss to the bank, of the sum of one hundred and thirty-nine thousand four hundred and nineteen,—($139,419) dollars.

17.

Of the several facts hereinbefore and hereinafter detailed, the Comptroller of the Currency of the United States was duly notified; he thereupon made an examination of the business and affairs of the bank and thereby being satisfied that the corporation was insolvent, that it had lost its capital, had closed its doors, stopped business and failed, he the said comptroller, in due form appointed a receiver, who under the said comptroller closed up the business of the corporation under the law for such case made and pro-
88 vided. The said comptroller by reason of the aforesaid misuses and waste of funds by the cashier, was unable to realize from the assets of the bank enough money to pay all of the debts of the corporation and he was compelled to and did levy and collect an assessment aggregating the amount of $55,000 upon the stockholders of said corporation, with which and what could be realized on the assets of the corporation, he paid all of the debts of said corporation and costs and expenses of closing up the said business.

18.

The plaintiff herein prior to the commencement of this action, in due form requested said corporation, its board of directors, the said receiver appointed to take charge of said insolvent bank, and the Comptroller of the Currency for said corporation to bring suit against the said executive committee and the several members thereof; the above-named defendant herein, for the amount of money which the said corporation lost by reason of the failure of said bank, resulting from the negligence of said committee and its members; and the said corporation, its board of directors, the
89 said receiver and comptroller each and all refused to bring any suit or legal proceedings in the premises; no action other than this present one has been brought in the premises and therefore plaintiff herein, for the benefit of the corporation, brought and he has duly prosecuted this action.

In the bringing and conduct thereof, the said plaintiff has, personally, without aid from any of the other stockholders borne the entire labor and expenses and costs of this suit; and the plaintiff herein employed and furnished the requisite attorneys, counsel and clerical assistance therefore and has paid all the expenses, costs and charges of depositions, notaries' and clerks' fees and done all matters necessary and proper in bringing, presenting and trying this case, and is entitled to a reasonable and proper amount of reimbursement and remuneration for his said time, labor and expenditures in the premises and for his liability incurred to counsel and attorneys for and in behalf of the corporation and the said stockholders thereof.

Dated this 20th day of November, A. D. 1894.

D. J. MURPHY,
Judge of said Court.

90 *Conclusions of Law.*

From the foregoing facts, as conclusions of law, the court now finds that a decree and judgment should be rendered in favor of plaintiff, for the benefit of the corporation, the California National Bank of San Francisco, for the aggregate amount of money lost by reason of said transactions and the failure of said bank, to wit, the sum of $139,419, with legal interest thereon from the 15th day of December, 1888.

That said judgment should be in favor of plaintiff therein, for the benefit of said corporation and against the said defendant Richard P. Thomas, together with costs of suit.

And, as further conclusions of law, the courts finds that the plaintiff herein should be allowed payment on account of his services to the corporation in the premises and for his counsel and attorneys and in consideration of the labor, time and money by him and them done and expended for and in behalf of the corporation, a reasonable amount to be fixed by this court and to be paid out of the first moneys collected in this suit.

91 Let a decree and judgment be entered accordingly.

Dated this 20th day of November, A. D. 1894.

D. J. MURPHY,
Judge of said Court.

Filed Nov. 20, 1894.

Judgment against Defendant Thomas.

(Title of Court and Cause.)

This cause came on regularly for trial, Messrs. Thompson & Thompson and E. S. Pillsbury, Esq., appeared as attorneys and counsel for plaintiff and Messrs. Mesick, Waters & Maxweil,—Messrs. Mastick, Belcher & Mastick,—and H. D. Talcott, Esq.,—and A. R. Cotton, Esq., as counsel for the various and respective defendants.

Whereupon witnesses on the part of plaintiff and defendants were duly sworn and examined, and documentary evidence introduced by the respective parties, and the evidence being closed and the cause, by all of the parties duly and regularly submitted, and

92 the cause having been regularly tried by the court and the findings of facts and conclusions of law having thereupon been duly made and the decision thereon having been duly rendered by the court, and the said findings, conclusions and decision in writing being now on file in this cause wherein judgment was ordered and awarded unto plaintiff against the defendant, Richard P. Thomas for the sum of $139,419.

It is now therefore ordered, adjudged and decreed that the plaintiff herein,—for the use and benefit of the corporation, the California National Bank of San Francisco,—do have and recover from the defendant, Richard P. Thomas, the sum of $139,419 with inter-

est thereon,—at the rate of seven per cent. per annum—from December 15th, 1888, together with plaintiff's costs and disbursements herein, taxed at $319.70.

Done in open court and dated this 20th day of November, A. D. 1894.

D. J. MURPHY,
Judge of said Court.

Filed Nov. 20, 1894.
Judgment recorded Nov. 21st, 1894, Book 23, page 347.

93 *Substitution of Attorney.*

(Title of Court and Cause.)

I hereby substitute J. A. Stephens as attorney in my place and stead for the defendant R. P. Thomas.
May 31, 1895.

H. D. TALCOTT.

I hereby consent to the above substitution.
May 25, 1895.

R. P. THOMAS.

I hereby accept the above substitution, and will act as the attorney of record in the above-entitled action, until further notice.
June 13, 1895.

J. A. STEPHENS,
Room 27, 10th Floor, Mills Building, S. F.

Duly served June 13 and 14, 1895.
Duly filed June 15, 1895.

Notice of Appeal.

(Title of Court and Cause.)

94 Take notice that the defendant Richard P. Thomas hereby appeals to the supreme court of the State of California from the judgment entered in the above-entitled matter on the 21st day of November A. D. 1894, in favor of plaintiff for the benefit of the defendant corporation and against said defendant Richard P. Thomas, for the sum of one hundred and thirty-nine thousand four hundred and nineteen ($139,419) dollars, with interest and costs as therein specified, and from the whole of said judgment.

Dated this 17th day of June, 1895.

J. A. STEPHENS,
Attorney for Defendant Richard P. Thomas.

To the clerk of said superior court, and, Messrs. Thompson & Thompson, attorneys for plaintiff; Messrs. Mastick, Belcher & Mastick, attorneys for defendant, Robert A. Wilson; Byron Waters, Esq., attorney for defendant, R. R. Thompson; Aylett R. Cotton,

Esq., attorney for receiver, S. P. Young; H. D. Talcott, Esq., attorney for defendant, The California National Bank of San Francisco.

Duly served June 17, 1895.
Duly filed June 18, 1895.

95 *Clerk's Certificate.*

I, C. F. Curry, county clerk of the city and county of San Francisco and *ex officio* clerk of the superior court of the said city and county, do hereby certify that the papers set out in the foregoing transcript are full, true and correct copies of the original papers on file in said action in my office, and that said transcript contains a copy of the notice of appeal and of the judgment-roll in said action. I further certify that an undertaking on appeal in due form has been properly filed in said action in my office within the time required by law.

In witness whereof I have hereto set my hand and seal of my office this 24th day of June, A. D. 1895.

C. F. CURRY, *Clerk*,
[SEAL.] By GEO. T. COVEY, *D. C. C.*

96 Due service of the within admitted this 29th day of June, 1896.

THOMPSON & THOMPSON,
Attorney for Plaintiff.

——— ———,
Attorneys for Def't Rob't A. Wilson.
BYRON WATERS,
Attorney for Def't R. R. Thompson,
AYLETT R. COTTON,
Attorney for Receiver, S. P. Young.

——— ———,
Att'y for Def't The Cal. Nat. Bank of San Francisco.

97 Filed July 22, 1896.

Department two.

JOHN CHETWOOD, JR., Plaintiff and Respondent,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO *et al.*, Defendants; R. P. Thomas, Appellant. } S. F., No. 177.

This is an appeal from the judgment alone.

Plaintiff, as a stockholder of the California National bank, prosecuted this action against certain directors of the bank to recover from them, and for the use and benefit of the corporation, the sum of $400,000, alleged to have been lost to the corporation by their negligent misconduct in the management of its affairs.

The bank had become insolvent before the commencement of the

action, and a receiver was in charge of its affairs. Plaintiff made demand upon the Comptroller of the Currency, upon the receiver, upon the corporation and upon its board of directors to prosecute the action, and upon their refusal it was instituted in his name as plaintiff.

The complaint, while it is entitled a bill in equity for an accounting and settlement of a trust, contains, as will hereafter be made manifest, nothing more than a charge *ex delicto* against certain directors for a breach and non-performance of their duties. The three directors whose conduct is attacked, and who are the defendants against whom a judgment is sought, are Richard P. Thomas, president of the corporation, Robert R. Thompson, vice-president, and Robert A. Wilson, a director; the three constituting the executive committee which is created and whose powers are defined by the by-laws.

The president and vice-president were under the by-laws *ex officio* members of this executive committee. The third member, Wilson, was selected by the board.

The complaint sets forth the section of the by-laws defining the powers of the president, and also that section specifying the duties and powers of the vice-president. It contains likewise a by-law defining the duties and powers of the executive committee, which is as follows:

"SECTION 7. There shall be appointed by the board of directors a committee known as the executive committee, consisting of the president, vice-president and one or more directors, to continue to act until succeeded, who shall have and exercise immediate supervision of all the officers and business of this bank; who shall audit all bills for current and other expenses, who shall have power to discount and purchase bills, notes, and other evidences of debt, and to buy and sell bills of exchange, coin and bullion, and loan money on personal security, and who shall at each regular meeting of the board of directors make a report of all bills, notes and other evidences of debt discounted or purchased by them for the bank, and of concurrent and other expenses audited since their last previous report."

The complaint then avers that the three defendants named "were duly elected and by said board appointed the executive committee of said corporation and board of directors;" * * * "and the said three persons have constituted and been the said executive committee under said by-laws; and thereupon each of said defendants Thomas, Thompson and Wilson duly accepted said office, to which they had as last herein aforesaid been elected and appointed;" * * * "and that upon their said election and appointment as such officers, the said three defendants severally, and as such president, vice-president and executive committee, duly accepted the positions of the respective officers, and as provided in the above-mentioned code of by-laws and the above-quoted sections thereof, and duly accepted the trusts and obligations to perform each and all of the duties therein prescribed, with due skill, care, attention, prudence, diligence and fidelity." "That, as such executive committee,

said three persons, Thomas, Thompson and Wilson, as such committee, assumed the discharge of the duties thereof, and in due performance of their duties had from said date of their first appointment continuously until the failure of said corporation the immediate supervision of all the officers and business of said corporation." * * * "On the said three said persons, the above-named defendants Thomas, Thompson and Wilson, as such executive committee, devolved, and continuously remained throughout all of said time, the duty to exercise immediate supervision of all officers and business of said bank for said corporation," etc. "That it was the duty of each of said members of the executive committee to exercise concurrently with his associates on said committee diligence and fidelity in performing the duties of said committee, as above detailed; that well knowing each and all of said facts above recited, said three persons above named, defendants Thomas, Thompson and Wilson, severally being fully aware of the nature and extent of said trust and the duties thereof, accepted and retained said trust, and unto the said corporation promised faithfully to discharge the same and each and all of the said duties thereof in a proper, careful and judicious manner." "That the business of said banking corporation was commenced shortly after October, 1886, but afterward, and for a long space of time, the defendants above mentioned, Thomas, Thompson and Wilson, not regarding their aforesaid duties, nor their respective and concurrent promises in that behalf, but wholly disregarding the same, and *contriving together to injure and deceive the said corporation, neglected and omitted*, without any reasonable excuse, to exercise their own skill, care, judgment and discretion in the making of loans and discounts out of the moneys in the possession of said bank, and otherwise directing the business of said bank, but they negligently permitted the cashier of said bank to control and manage the whole business of the said bank as he saw fit, and without consulting or in anywise informing said defendants, or any or either of them, to lend the moneys of the said bank according to his own pleasure, by bills of exchange, without any consultation with said defendants, or any or either of them, in such manner as he, the said cashier, elected, to dispose of all the moneys of said bank." "That by such negligence, worthless loans, and the various transactions above mentioned, the moneys of the corporation were wasted, misused and lost."

Then follow averments of specific instances of loss occasioned by improvident loans and purchases made by the cashier without the knowledge of these defendants; averments of demand upon the corporation, the receiver and the comptroller to commence suit. It is then averred "that the defendants Thomas, Thompson and Wilson are financially responsible and able to make good the losses which have resulted to said corporation by reason of their said negligence;" and, in conclusion, a prayer "for a decree that the said trustees, the above-named defendants Thomas, Thompson and Wilson, be held to an accounting of their said trust; that they restore unto said corporation the sum of $400,000, with legal interest;

that a joint and several money judgment against them, the
98 said Thomas, Thompson and Wilson, for the sum of $400,000, with legal interest thereon from the time of such loss, and costs herein, be rendered and entered by this court in this case in favor of said corporation, the California National Bank of San Francisco."

For reasons which will hereafter appear, we do not consider it necessary to meet and dispose of many of the objections raised by appellant to this complaint. Therefore, it will be assumed, without deciding, that the complaint is sufficient to state a cause of action in its averments of misconduct, and that its averments of a demand and refusal to prosecute upon the comptroller, the receiver and the corporation itself are sufficient. And so as to other points of objection raised by appellant, the silence of this opinion is not to be construed as a determination of them.

There is no room for argument upon the question as to whether this complaint is upon a cause of action *ex contractu*, or upon one sounding in tort. It demands a joint and several money judgment against three men constituting an executive committee, and charged with the performance of certain duties, for "contriving together to injure and deceive the corporation," and for injuring and deceiving it, by neglecting their duties, in the sum of $400,000. These defendants are charged throughout as joint tort-feasors. If they were not they could not be made defendants in one action. Their contrivance to injure was their joint contrivance. Their neglect is pleaded as their joint neglect to perform, not duties individually imposed upon them, but collectively undertaken as members of the executive committee. It is as members of the executive committee that they are alleged to have done the wrongs and permitted the losses. It is true that the complaint sets forth the by-laws relative to the duties of the president and of the vice-president, but no charge of loss incurred by negligence is made against the president as president. If there were, then, as the other two defendants would not be chargeable with the president for his individual misconduct as president, it would be the subject-matter of a separate action, and have no place in this complaint. The prayer of the complaint, which may be looked to for aid in determining the nature of the proceeding, asks for a joint and several money judgment in the sum of $400,000, with legal interest, against the three defendants. No claim is anywhere made that there is a several and separate liability upon any one of the three, and not upon the others, for any of the acts charged against. To the contrary, from the beginning of the complaint to its prayer for a judgment, it is averred that the loss sustained was suffered through the common and collusive negligence of the three. It is alleged that the three defendants are "financially responsible and able to make good the losses which have resulted by reason of *their said negligence*." If the negligence did not arise in their failure to perform a common duty, they could not and would not have been made joint defendants. The trial court, moreover, found them to be

jointly liable, and ordered a judgment against the three in a single amount.

The gravamen of the charge is the injury to the property of the bank by reason of the wrongful acts of the defendants. For these wrongful acts defendants are liable in tort, and the fact that there might be another cause of action *ex contractu* is a matter entirely apart. It frequently happens that the negligence complained of is the breach of a duty originating in contract, and in such cases the cause of action for tort may coexist with a liability upon the contract. The negligence of a common carrier gives rise to an action *ex contractu*, or to one of trespass on the case. Historically, the action for tort is the older. "If a smith prick my horse with a nail I shall have my action upon the case against him, without any warranty by the smith to do it well. * * * For it is the duty of any artificer to exercise his art rightly and truly as he might." F. N. B., 94 D. Even an intention to violate another's rights of property is not necessary to give one his action for trespass regarding his lands or goods. With or without contract the duty is imposed upon all not to injure the property of another. And for a failure to observe that duty the right of action in trespass for the tort exists.

Such is the cause of action here set up. The averments that defendants "promised faithfully to discharge their trust with due care and attention," etc., are unnecessary, and do not affect the cause of action. The law imposed upon them the duty of using due care when they agreed to discharge their duties as members of the committee. Their failure to use due care was a wrong, for which plaintiff is seeking redress. This wrong is charged, not to have been committed inadvertently or carelessly, which would amount to negligence pure and simple, but to have been wrought against the corporation through contrivance and collusion, with a design to injure it—a charge which establishes that the pleader must have considered that he was dealing with a case of willful tort, partaking of the nature of a fraud.

It is claimed by appellant that the findings are not responsive to the issues joined by the pleadings, and to the understanding of this contention some explanation becomes necessary.

The three defendants answered this complaint, making denial of the charges against them, and trial was had. The court, upon April 27, 1894, made and filed what it entitled an "order of judgment," as follows:

"This cause having been heretofore submitted to the court for consideration and decision, and taken under advisement, and the court having fully considered the same, and being fully informed, it is ordered by the court that judgment be and the same is hereby entered in favor of the plaintiff, and against the defendants, Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, and in favor of the other defendants herein, and, inasmuch as the testimony is unsatisfactory, the court being unable therefrom to determine the amount for which judgment should be entered, it is ordered by the court that a referee be appointed to take proof on that subject," etc.

The referee was appointed, and directed to ascertain and report to the court the amount of the indebtedness due to the bank by certain named debtors thereof, for whose debts the defendants were to be held responsible. Upon August 17, 1894, the referee made his report, and found that there was owing to the bank from these debtors a sum of money in excess of $190,000. After this report had been filed, plaintiff accepted from two of the defendants, to wit: from Thompson and Wilson, the sum of $27,500, and for and in consideration of said sum renounced and withdrew his cause of action against these defendants, and dismissed the same, causing a formal judgment of dismissal to be entered therein. The judgment of dismissal follows the language of the stipulation which the parties entered into, and which declared that the plaintiff "hereby renounces and withdraws his cause of action herein as against the said defendants, and that he will not further prosecute the same;" "that, pursuant to the foregoing renunciation and withdrawal by the plaintiff of his said cause of action, this action be and is hereby dismissed against the said defendants." The order for a dismissal was filed September 24, 1894, and the judgment was formally entered upon the same date. The stipulation for dismissal was, however, entered into upon September 13, 1894.

Upon the 20th day of November, 1894, the court made and filed its findings of fact and conclusions of law. Throughout these findings no mention is made of any dereliction of duty upon the part of Thompson and Wilson. It is not found that the executive committee, or that any member of the executive committee, or that Thompson, or that Wilson, was or was not negligent, did or did not contrive together, or with Thomas, to injure and deceive
99 the corporation. The findings are absolutely silent upon all of these material averments. In them, however, is set forth the by-law defining the duties of the president, and the findings proceed to charge the appellant herein, *as president*, with having himself individually committed acts of negligence by allowing the cashier to make loans which resulted in a loss to the corporation of the sum of $166,919. It is then found that, "from the defendants, Robert R. Thompson and Robert A. Wilson—of, for and on account of said loss—there has in this action been collected the sum of twenty-seven thousand five hundred ($27,500) dollars, leaving a net loss to the bank of the sum of one hundred and thirty-nine thousand four hundred and nineteen ($139,419) dollars." And under these findings a judgment is entered that the California National Bank of San Francisco have and recover from the defendant, Richard P. Thomas, the sum of $139,419, with interest.

There is here an absolute failure by the court to find upon the most material issues of the case, the joint negligence of the three defendants, which alone it is alleged has occasioned loss to the bank. Such is the cause of action pleaded in the complaint. The findings, if it be conceded that they give evidence of a meritorious cause of action against defendant Thomas, do so because of a showing that he was negligent, not with the other defendants and as a member of the executive committee, but that he was individ-

ually and separately negligent in the performance of his duties as president. But this is not the cause of action pleaded againm him, and it is well settled that, where the case made out by the findings is a different case from that presented by the pleadings, the judgment will be reversed; for the relief decreed must be the relief sought, and the variance, even if it be such as could have been cured by amendment, is fatal to the validity of the judgment (Bryan *vs.* Tormey, 84 Cal., 126), and the point may be raised upon appeal from the judgment alone. Putnam *vs.* Lamphier, 36 Cal., 151.

But, while this error would necessitate a reversal, there is yet a more serious objection to be considered. This action, while in form pertaining to equity, is in its cause and substance a legal action to recover damages for tort against the three defendants pleaded as joint tort-feasors. "A suit of this character," says Morawetz (Corp., § 271), "is brought to enforce the corporate or collective rights, and not the individual rights of the shareholders. It may, therefore, properly be regarded as a suit brought on behalf of the corporation, and the shareholder can enforce only such claims as the corporation itself could enforce. Moreover, the essential character of a cause of action belonging to a corporation remains the same, whether the suit to enforce it be brought by the corporation or by a shareholder. Thus, a legal right of action would not be treated as an equitable one, or become governed by the rules applicable to equitable causes of action as to limitations, etc., because a shareholder has brought suit in equity to enforce it on behalf of the company."

In Hun *vs.* Cary, 82 N. Y., 70, just such an action as the one at bar was brought by the receiver of the Central Savings Bank of the City of New York against defendants, who were trustees of the bank, to recover damages which it is alleged they caused the bank by their misconduct as trustees. Objection was made in the appellate court that the cause pertained to equity, and should have been tried before the equity branch of the court, instead of before a jury. The court of appeals used this pertinent language in disposing of the contention: "The receiver in this case represents the bank, and may maintain any action the bank could have maintained. The trustees may be treated as agents of the bank, and for any misfeasance or non-feasance causing damage to the bank they were responsible to it upon the same principle that any agent is for like cause responsible to his principal. It has never been doubted that a principal may sue his agent in an action at law for any damages caused by culpable misfeasance or non-feasance in the business of the agency. The only relief claimed in this complaint was a money judgment, and, we think, was properly tried as an action at law. No equitable rights were to be adjusted, and there was no occasion to appeal to an equitable forum. * * * In actions *ex delicto* the plaintiff may sue one, some, or all of the wrongdoers. * * * This claim was purely for unliquidated damages occasioned by a tort."

While plaintiff may sue one or all of joint tort-feasors, and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satis-

faction. Once paid for the injury he has suffered, by any one of the joint tort-feasors, his right to proceed further against the others is at an end. Where several joint tort-feasors have been sued in a single action, a retraxit of the cause of action in favor of one of them operates to release them all. The reason is quite obvious. By his withdrawal plaintiff announces that he has received satisfaction for the injury complained of, and it would be unjust that he should be allowed double payment for the single wrong. It matters not, either, whether the payment made was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law a satisfaction of the claim against them all.

In the case at bar it is disclosed that, after the court had awarded a single judgment, not in separate amounts, but in a lump sum, against the three defendants jointly charged, who were thus found to be jointly liable, the plaintiff accepted from two of them the sum of $27,500 for and on account of the injury and loss which the corporation had sustained, and a judgment of dismissal in their favor was accordingly entered. That this judgment, entered under the stipulation of the parties, was a retraxit there can be no doubt. Merritt *vs.* Campbell, 47 Cal., 542. The findings disclose that payment was made by the two defendants upon account of the judgment ordered against the three jointly, and the release was doubtless in consideration of that payment. Where a joint action is brought against two or more for trespass done, and all are held liable, the judgment must be for joint damages. All legal consequences of a joint judgment must follow. Each is liable for all the damage which the plaintiff has sustained, without regard to their different degrees of culpability, and a release to one discharges all.

The plaintiff in this case, by accepting $27,500 from the two defendants for and on account of the joint trespass of the three, and by releasing them, has released his claim against the third. In Urton *vs.* Price, 57 Cal., 270, an action for personal injuries occasioned by the explosion of chemicals was brought against Price, the demonstrator at a lecture. The charge was negligence. Thereafter plaintiff added The Mechanics' Institute, under whose direction the lecture was given, as a defendant. Subsequently plaintiff filed a stipulation discontinuing and dismissing the action as to the defendant The Mechanics' Institute. Thereupon the defendant Price filed an amended answer, setting forth that after the commencement of the action plaintiff had accepted $500 from the Mechanics' Institute, for and on account of the injury he had received, and had dismissed the suit as to the institute. Judgment was entered in the trial court that plaintiff had received satisfaction for his injuries, and upon appeal to this court it was held that this constituted a release of plaintiff's claim against Price.

In Tompkins *vs.* Clay St. R. R. Co., 66 Cal., 163, plaintiff sued the Sutter Street Railroad Company and the Clay Street Railroad Company for damages for personal injury, alleging that it was occasioned by their joint negligence. The court refused to instruct the jury as follows:

100 "The defendant Clay Street Hill Railroad Company, by its supplemental answer, avers that plaintiff has released and discharged the Sutter Street Railroad Company. If you find from the evidence that the plaintiff has received any sum of money whatever from the defendant Sutter Street Railroad Company, as compensation for the injuries received by her, and has released and discharged the defendant The Sutter Street Railroad Company from all claim for damages arising out of this action, then you are instructed to bring in your verdict for the defendant The Clay Street Hill Railroad Company."

This court reversed the case for the refusal to give this instruction, holding it to be proper, and laying down the rule as here set forth, and as universally accepted, that the release and discharge of one alleged tort-feasor is a bar to further proceedings against the others.

In this case it is true that the release is not pleaded by defendant Thomas in any supplemental answer, but the release itself was given after the court by its order for judgment had fixed the responsibility and the liability of the three defendants, and the record in this case and the declaration of the findings show that the money was paid for and on account of the loss which the court determined had been sustained by reason of the acts of the defendants. It clearly establishes the release and the reason for it. Intolerable fraud and oppression could be worked if a judgment such as this, and so obtained, could stand. The circumstances of this case make that manifest. Three men are charged with having committed acts resulting in a loss to the company of $166,000. The complaint avers that these men are each and all financially able to make good the loss. The case is tried, and the court finds them jointly liable. Upon the announcement of the judgment, two go to plaintiff and purchase their release for a small sum of money, and go free, while the third, who is adjudged by the court to be no more guilty than his fellow-defendants, is cast for the whole amount of the loss. Even if the authorities were not, as they are, unanimous upon the subject, the injustice of such a procedure would be reason enough for the creation of a rule. There is no necessity for creating a rule, however, for we are called upon only to announce that which has long been established and universally followed.

The judgment is reversed and the cause remanded, with directions to the trial court to enter a judgment in favor of the defendant Thomas.

HENSHAW, *J.*

We concur.

McFARLAND, *J.*

TEMPLE, *J.*

101 In the Supreme Court of the State of California.

JOHN CHETWOOD, JR., Respondent,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a Corporation, *et al.*, Appellants.

By the COURT: Rehearing denied Oct. 21, 1896.

Beatty, C. J., dissenting.

Endorsed: Filed Oct. 22, 1896. T. H. Ward, clerk, by A. W. Johnson, deputy.

102 S. F., No. 177.

San Francisco Co. JOHN CHETWOOD, JR., Pl'ff & Resp., *v.* THE CALIFORNIA NATIONAL BANK OF San Francisco (a Corporation), Richard P. Thomas, *et al.*, Def'ts; Richard P. Thomas, Appellant. — Thompson and Thompson. J. A. Stephens.

1895. S. F., $10.00.
July 3. Filed transcript.
" 3. " affidavit of service of transcript.
Aug. 3. " aff. & order app. 10 days from date to file opening brief.
" 12. " aff. & order app. Aug. 23rd, 1895, to file opening brief.
" 20. " appellant's opening P. & A.
Sept. 6. " stip. and order extending respondent's time until Oct. 7th to file P. & A.
Oct. 5. " resp. P. & A.
Oct. 16. " appellant's reply brief.
1896.
Jan. 28. " notice of motion to dismiss & order shortening time of notice.
Feb'y 3. Motion to dismiss arg., and denied. (1.)
Feb'y 18. Cause arg. and submitted. (2.)
M'ch 3. Filee argument of Mr. Vanness.
July 22. The judgment is reversed and the cause remanded, with directions to the trial court to enter judgment in favor of the defendant Thomas. Henshaw, J. (2.)
We concur: McFarland, J.; Temple, J.
Aug. 12. Filed petition for rehearing.
Aug. 22. By the court: Rehearing denied Aug. 21, 1896, Beatty, C. J., dissenting.
Aug. 22. Remittitur to county clerk.

103 *Judgment.*

Minutes of court.

"Supreme court calendar.

"WEDNESDAY, *July 22nd*, 1896.

"No., S. F., 177.

"Title of Cause.

"CHETWOOD, JR.,
vs.
"CALA. NATIONAL BANK *et al.*

"The judgment is reversed and the cause remanded, with directions to the trial court to enter judgment in favor of the defendant Thomas.

"HENSHAW, *J.*

"We concur.
"McFARLAND, *J.*
"TEMPLE, *J.*"

104 In the Supreme Court of the State of California.

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the register of actions and judgment *In re*, S. F., 177, John Chetwood, Jr., *vs.* Cal. Nat'l Bank of S. F. *et al.*, as shown by the records of my office.

Witness my hand and the seal of the court this 19th day of Nov., A. D. 1896.

[Seal Supreme Court of California.]

T. H. WARD, *Clerk*,
By R. A. MARSHALL, *Deputy*.

105 [Endorsed:] No., S. F., 177. In the supreme court, State of California. John Chetwood, Jr., *vs.* Cal. Nat'l Bank of S. F. *et al.* (R. P. Thomas, appellant).

106 In the Supreme Court of the United States.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, Plaintiff in Error,
vs.
R. P. THOMAS, Defendant in Error.

Know all men by these presents, that whereas a writ has been allowed by an associate justice of the Supreme Court of the United States, and said writ of error has been issued accordingly, for the purpose of having reviewed the alleged errors committed by the supreme court of the State of California in the matter of its decision

rendered in that certain cause whereby John Chetwood, Jr., was plaintiff and respondent and The California National Bank of San Francisco was defendant and respondent and R. P. Thomas was defendant and appellant, which said cause was numbered in said California supreme court S. F., number 177;

And whereas a citation on said writ has been issued by said associate justice of the Supreme Court of the United States:

Now, therefore, in consideration of the premises the undersigned do joint- and severally undertake and promise on the part of the said plaintiff in error that the said plaintiff in error shall prosecute its said writ to effect, and if it fail to make its plea good that it shall answer all damages & costs not exceeding the sum of $500.00 in lawful money of the United States; for the payment of which amount we acknowledge ourselves jointly and severally bound.

W. H. VANDERSLICE.
C. H. HOLT.

107 The foregoing security is hereby approved this 24th day of Sept., 1896.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

108 [Endorsed:] S. F., 177. Security on writ of error. In the Supreme Court of the United States. The Cal. Nat. Bank of S. F., pl'ff in error, *vs.* R. P. Thomas, def't in error. Filed Oct. 19, 1896. T. H. Ward, clerk, by A. W. Johnson, deputy.

109 In the Supreme Court of the United States of America.

THE CALIFORNIA NATIONAL BANK (OF SAN FRANCISCO), Plaintiff in Error,
vs.
RICHARD P. THOMAS and JOHN CHETWOOD, JR., Defendants in Error.

Assignment of Errors and Petition for Writ of Error.

To the honorable the Supreme Court of the United States:

Now comes plaintiff in error (one of the defendants and respondents in the court below) and respectfully shows and represents that manifest error appears on the face of the record in this cause in the following particulars, to wit:

1st. That according to the law of the land the judgment should have been in favor of the plaintiff John Chetwood, Jr., and in favor of the plaintiff in error, the said California National Bank, and against the defendant in error Richard P. Thomas, defendant and appellant in the court below, for the amount found due and unpaid, and the judgment of the trial court holding the said defendant in error, Richard P. Thomas (who was a defendant and appellant in the court below), liable and indebted to the said defendant, The California National Bank (plaintiff in error), in the sum of $139,419.00

and $319.70 costs and interest since November 20th, 1894,
110 should have been affirmed.

2d. That it appears from the opinion and decision by the supreme court of the State of California that its conclusions of law and its decision and judgment are erroneous in each and every particular, and the conclusions of law are not legally deducible from the findings of facts in the record made by the trial court or from the facts as stated and found in the said decision and opinion of the said supreme court of said State.

3d. That it appears from said findings of facts that the said Richard P. Thomas (defendant in error) was and is indebted to said plaintiff in error in the aforesaid sum of money, no portion of which has ever been paid, and that said debt of $139,419.00 remains and always has been and still is wholly and entirely unpaid and unsatisfied and due and owing to said banking corporation (plaintiff in error).

4th. That it appears upon the face of said record that said debt was never satisfied, in whole or in part; that the total debt or sum lost to the said bank, which said R. P. Thomas owed and was liable for, amounted to $166,919.00, which was at the date of the trial of said action due and owing to plaintiff in error from said R. P. Thomas, R. R. Thompson, and R. A. Wilson, defendants, and that the only sum or amount paid thereon was the sum of $27,500.00, paid thereon by said Thompson and said Wilson, which said sum was paid and received on account merely of said debt and as a partial payment thereof only and not otherwise.

5th. That the trial court so found and the supreme court of said State in its opinion so admits, states, and recites the facts
111 to be, and the said supreme court of the State of California therefore had no right or power to decide and adjudge that the said sum of $27,500.00 so paid as aforesaid and as part payment only and on account merely was payment in full and complete satisfaction of said claim and admitted indebtedness and liability of $166,919.00.

6th. That the supreme court of said State erred in holding that said John Chetwood, Jr., defendant in error (plaintiff in court below), had power to accept the said sum of $27,500.00 as full satisfaction of the liability and claim due said plaintiff in error.

7th. That it appears from the record in this cause that the right and title of plaintiff in error to said judgment and to said sum of money arose and was derived from and under the laws of these United States, and particularly those sections of the Revised Statutes authorizing the creation of associations for carrying on the business of banking, and empowering such association to elect and appoint directors, and by its board of directors to appoint a president, vice-president, and cashier and other officers and define their duties, and to prescribe by its board of directors by-laws not inconsistent with law regulating the manner in which its officers shall be appointed, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

8th. That by the articles of association of said plaintiff in error,

lodged with the Comptroller of the Currency in accordance with the laws of these United States, the same power to appoint officers and define their duties and adopt by-laws was given the said
112 association by and through its directors, and the said association (plaintiff in error) afterward adopted by-laws and provided for the appointment of a president, vice-president, and executive committee, fixed and defined the duties of said officers, and appointed said defendants to said offices respectively, and said defendants, Thomas, Thompson, and Wilson, thereupon assumed the duties so imposed and contracted and agreed with plaintiff in error faithfully to perform all obligations, and it is by a breach of the contractual relations and obligations so imposed that the said indebtedness and liability arose, and said suit was brought to recover for such breach.

9th. That the supreme court of said State erred in holding and deciding that no duties arose or were imposed by said by-laws, and in deciding that the action was a suit to recover for a tort, to wit, an obligation arising independent of contract and not imposed by said by-laws and defined by said association through its directors, in accordance with and in pursuance of the said power given under and by virtue of the laws of these United States.

10th. The said supreme court of said State further erred in holding that there was not a sufficient finding of the liability of the said defendant, R. P. Thomas, to uphold the judgment, and erred in reversing the said judgment for this reason, and erred in ordering judgment in his favor.

11th. The supreme court of said State erred in finding and deciding that the liability of said defendants in error arose by reason of negligence unconnected with any contract, and erred in failing to find and decide that the liability arose from under and by
113 virtue of the contract entered into under and in pursuance of the provisions of the laws of these United States and the obligations so assumed, which depend for their force and efficacy upon and arise under the said laws of the United States.

12th. The supreme court of said State erred in holding and deciding that the said liability and indebtedness was a mere tort or common-law liability arising independent of said contracts and independent of said laws of these United States.

13th. The supreme court of said State erred in holding that there was a failure to find upon defendant's joint negligence, and erred in not upholding the judgment made and entered by the trial court, and erred in reversing it on this ground, and erred in deciding that the case made out by the findings of the trial court was different from the case pleaded in the complaint, wherein plaintiff (below) set up and alleged the facts constituting the said contractual relation and the said by-laws of said national bank and the breach of the duties so imposed and obligations so assumed and the rights of said national bank arising under said by-laws and the laws of these United States and the obligations of the officers of the said national bank arising under its by-laws and the said laws of these United States.

14th. The supreme court of said State erred in disregarding the allegations of said complaint with reference to said by-laws and said laws of these United States, and erred in treating them as mere surplusage and of no weight or moment in giving character to said pleading, and erred in disregarding the findings of facts upon
114 said complaint made by the trial court, wherein the liability of said defendant, R. P. Thomas, is based and predicated upon said by-laws and said laws of these United States, and erred in denying plaintiff and plaintiff in error the right to have and recover and collect of said R. P. Thomas the judgment rendered and the sums of money claimed as a debt accruing and due under and by virtue of the said by-laws and the said provisions of the Revised Statutes of these United States.

15th. That it is and has been ever since the Dartmouth College case a settled law of these United States and of the State of California that the said articles of association and the said by-laws of said corporation are each and every one of them contracts, and breach of the obligation of such contracts or of either of them gives not only rights under the laws of the United States, but the obligation thereof, and one term or condition thereof has been and was prior to the said decision in this case that a claim or chos- in action arising from a breach of such articles of association or the duties imposed thereby or by the by-laws could not be satisfied without full payment.

That the said decision of the supreme court of said State is an act of legislation, and by said decision the said State of California has passed a law impairing the obligation of the contracts made and existing by and between the said plaintiff in error, its stockholders and officers, the defendants in error.

16th. That by said decision of the supreme court of said State the said State has deprived this plaintiff in error of its property,
115 to wit, the said unpaid balance of the said $166,919.00, to wit, of the said sum of $139,419.00, without due process of law, contrary to the provisions of the 14th amendment to the Constitution of the United States.

17th. That the lower court at the trial found and decided and the supreme court of said State in its opinion also found and decided that said plaintiff in error was entitled to recover of said R. P. Thomas (defendant in error) the said sum of $139,419.00 over and above the said sum of $27,500 00 paid, and the supreme court of said State further decided and stated in its opinion that the trial court had so decided and had rendered judgment for said total sum of $166,919.00 before the payment of said $27,500.00 on account thereof.

That thereafter no proceedings were had and nothing done to deprive this plaintiff in error of its said property in said sum of money other than as recited in the said decision and in the record herein, which said proceedings were and amounted to a mere dismissal of the action as against two of the defendants in error, and receipt of the said sum of $27,500.00 which was paid into court and not to plaintiff nor to plaintiff in error, and which was paid and

received on account merely of said total liability indebtedness or loss.

That the said dismissal was the act of plaintiff, who is now a defendant in error, and was not the act of this plaintiff in error, and was given and made after the trial court had rendered its judgment and announced and decided and adjudged that the plaintiff in error was owner of said total sum of $166,919.00 and entitled to have and recover the same of and from said defendants in
116 error; all of which appears and is stated, recited, and admitted in the opinion and decision of the supreme court of said State.

And the said court last mentioned erred in holding, finding, and deciding that such payment and dismissal were a satisfaction.

The supreme court of said State erred in deciding that such procedure was due process of law, whereby such indebtedness could be satisfied, and erred in not deciding that such proceedings did not amount to due process of law, and erred in deciding that said proceedings by plaintiff were, according to the law of the land, a satisfaction of the cause of action and the debt due plaintiff in error, and erred in not deciding that said proceedings were not a satisfaction according to the law of the land, and that they were not due process of law and were not in accordance with the common law or the law of the land.

The supreme court of said State erred in deciding that any act or proceeding or step taken or stipulation or dismissal or order or judgment made on mere motion of said plaintiff and after the said decision of said court in favor of plaintiff in error without notice to this plaintiff in error or its consent was sufficient to satisfy, cancel, destroy, or deprive this plaintiff in error of its property, to wit, the said debt so due it, and the judgment of said trial court so awarded, and by the decision of said court so deciding the said State has deprived plaintiff in error of its property without due process of law.

18th. The said supreme court of said State erred in deciding that a dismissal is a retraxit.

117 19th. The said court erred in deciding that a retraxit ever amounted to or was the same as or imported a satisfaction or was or is identical with full payment and satisfaction.

20th. The decision of said supreme court of said State which admits that plaintiff in error had and owned a sum of money in the hands of defendants in error amounting to $166,919.00 and had been awarded a judgment therefor, but further decides that payment of a portion of said sum into court and a dismissal of the action by the nominal plaintiff destroyed and satisfied said claim and judgment, took the property of plaintiff in error without due process of law.

21st. That by said decision of said supreme court of said State, wherein it states and decides that a retraxit at common law imported or now imports or was identical with a satisfaction independent of the intent of parties thereto, the said court of said State erred in its interpretation of the law of the land, and such decision takes and

has taken and deprived this plaintiff in error of its property without due process of law.

22*th*. By the said decision the said State has denied to the plaintiff in error and its stockholders the equal protection of the laws, and thereby infringed and erred against the letter and spirit of the 14th amendment to the Constitution of these United States.

The supreme court of said State erred in denying plaintiff (acting on behalf of plaintiff in error) the right to call its officers appointed under and in pursuance of the laws of these United States to an account, and in refusing to sustain said right to an accounting
118 of their said trust imposed by and under the laws of the United States, and in deciding that plaintiff and plaintiff in error had sued to enforce a mere tort independent of the liability imposed by statute and by the acticles and by-laws of said association (plaintiff in error), and in deciding that the right to an accounting under said laws of the United States did not exist, and that the plaintiff in error had no right to call its said officers to an accounting of their said trust under said statutes of the United States, and in denying said right, and in deciding that the said statutes gave plaintiff and gave plaintiff in error no such or similar right and imposed no duties or liabilities on said Thomas, Thompson, and Wilson, defendants, and in deciding that this action was one of pure tort, with all the peculiar and technical rules of the common law applying thereto, instead of an action for an accounting and to enforce the liability of officers of a national bank under the statutes of the United States.

23d. That the said decision of said supreme court of said State is a final decree in the highest court of said State in which a decision in this suit could be had.

24th. In said suit the authority of this plaintiff in error, a national bank, one of the instruments designed to aid the Government of the United States in the administration of an important branch of the public service exercised under the United States, through its directors, over its president, has been drawn in question and the said decision is against the validity of such authority, and
119 the right of the plaintiff to recover for the plaintiff in error and of the plaintiff in error to have and recover and retain through a suit in equity an accounting for moneys of the said bank taken and paid out under or by the connivance or through the fault of said defendants, Thomas, Thompson, and Wilson, is a right that plaintiff (on behalf of plaintiff in error) and plaintiff in error claimed and claim under the Revised Statutes of these United States and under the charter and commission held under the United States to said bank (the plaintiff in error), granting it power and allowing it, through its directors, to exist and do business and adopt by-laws, appoint officers, and define and enforce their duties and under authority exercised under the United States, and such right plaintiff, on behalf of plaintiff in error, and plaintiff in error claimed in this suit, and such right was denied by said supreme court of said State, and therein said court erred.

Said plaintiff in error, also, and said plaintiff in behalf of said

plaintiff in error claimed in said suit that under the Constitution and statutes of the United States and its articles of association entered into in pursuance thereof and under its certificate of organization made in accordance therewith that it had the privilege of making its officers responsible in contract and not solely in tort and of calling them to accounting in equity of their said trust so imposed under said laws of the United States, which said privilege so claimed was denied, and therein said court erred.

The said plaintiff in error (and plaintiff on behalf of plaintiff in error) also claimed in said suit that under said statute and
120 commission held and authority exercised under the United States they (said plaintiff and plaintiff in error) enjoyed immunity from the rules applicable to ordinary action for tort, and that the liability imposed upon said officers of said plaintiff in error to make good any losses occasioned to said bank was a liability which, by virtue of the creation and organization of said association under the laws of the United States, could not be satisfied by a payment of part of the said loss and a release of one of said officers from such liability, but that each and all of said officers, by accepting such position as such officers of said national bank, became liable to an accounting for and of his said trust and contracted to comply with the by-laws of said bank and to make good any loss caused through his act or omission, and this immunity from technical rules applicable to suits in tort, so claimed by plaintiff and plaintiff in error, said supreme court of said State denied and decided against the said rights, privileges, and immunities so as aforesaid claimed, and therein erred.

That said plaintiff in error (and plaintiff in behalf of plaintiff in error) claimed in this suit that after the order of the judge of the trial court announcing and adjudging that plaintiff was entitled to a judgment on behalf of plaintiff in error against defendants Thomas, Thompson, and Wilson this plaintiff in error had control of said action and of said judgment, and that said judgment and said moneys so awarded it were and are the property of plaintiff in error, and under the Constitution of the United States the plaintiff in error could not be deprived of its property in said sum of money and in said judgment so awarded it by any act of plaintiff, John Chetwood (now defendant in error), who
121 was and is the nominal plaintiff only and a stockholder in plaintiff in error merely, and who sued on behalf of himself and other stockholders and recovered a judgment in favor of plaintiff in error, and that the said alleged dismissal of said suit by said nominal plaintiff, Chetwood, on the payment of $27,500.00 was not only not intended by said Chetwood to operate as a satisfaction of the said total liability, amounting to $166,919.00, as found by said trial court and stated and admitted, found and recited by said supreme court of said State in its decision, but, further, the said acts of said Chetwood could not deprive this plaintiff in error of its right to a judgment for said balance of said sum, to wit, $139,419.00, against the defendant in error, R. P. Thomas, and the said plaintiff in error claimed that it was under the Constitution of the United

States entitled to have and recover such judgment against said R. P. Thomas despite the said acts of said Chetwood, and claimed that the decision of the said supreme court adjudging and decreeing that such proceedings and acts by said Chetwood satisfied said claim and liability and debt due plaintiff in error and said judgment and released the said R. P. Thomas from all liability to plaintiff in error deprived this plaintiff in error of its property without due process of law, and by such final decree of said supreme court of said State the said State would and it did deprive said plaintiff in error of its property without due process of law, and the said supreme court of said State decided against the said right and title to said moneys so claimed by said plaintiff in error, and therein erred.

122 The plaintiff in this cause claimed on behalf of plaintiff in error and plaintiff in error claims that a true construction of the laws of the United States, and particularly sections 5136 Rev. Stat., gave plaintiff in error a right to recover of defendant in error for the losses caused by failure to supervise the acts of the cashier of said bank as for a breach of his trust as trustee and president and of his contracts entered into as such officer and stockholder of the bank with the plaintiff in error.

The supreme court of said State denied said right and said claim and decided that no right existed save the right to sue in tort, and therein erred.

The plaintiff claimed that he did not satisfy the debt due plaintiff in error by allowing $27,500 on account thereof to be paid into court and withdrawing his cause of action as against the parties paying said sum, and plaintiff in error claimed and claims in said suit that the nominal plaintiff, a mere stockholder, had no power to satisfy said debt after the trial court had awarded plaintiff in error a judgment or to accept part payment in full payment and satisfaction of such debt due and judgment recovered by and on behalf of said corporation; and plaintiff and plaintiff in error claimed that under the Constitution of the United States and the 14th amendment thereof the said courts of said State had no power to decree the said judgment so rendered on April 27, 1894, or the judgment entered and recorded November 20th, 1894, paid and satisfied by reason of a retraxit or by reason of any act done or proceeding taken by said nominal plaintiff thereafter or theretofore or between said dates or ever or at all, and that said courts

123 under said Constitution had no power to order that the formal judgment thereafter entered on November 20th and 21st, 1894, in accordance with the finding filed be reversed on this ground, and had no power to order on this record that judgment be entered therein or herein in favor of defendant in error, R. P. Thomas, for his costs or at all.

The plaintiff in error and plaintiff in its behalf also at all times claimed in this suit and claim that plaintiff in error was and is entitled to have and recover said unpaid balance of said debt or said sum of $139,419.00 of and from said R. P. Thomas, and that said money and the judgment rendered therefor in this suit by the trial

court on April 27th, 1894, and entered and recorded Nov. 20th and 21st, A. D. 1894, was and is the property of said bank, plaintiff in error, and under the said Constitution due process of law was necessary before said bank could be deprived of said sum or of said judgment or the said judgment satisfied.

That a retraxit by the nominal plaintiff given to one or more of the defendants in said cause does not, did not, and could not operate as a satisfaction of the judgment theretofore rendered or of the judgment thereafter entered and recorded in favor of plaintiff in error against the remaining defendant (the defendant in error), R. P. Thomas.

That to so hold or decide was to deprive plaintiff in error of its property without due process of law, contrary to said Constitution and amendment thereto.

The decision of said supreme court of said State on said matter and said claims was in words and figures following:

124 "In the case at bar it is disclosed that after the court awarded a single judgment, not in separate amounts, but in a lump sum, against the three defendants jointly charged, who were thus found to be jointly liable, the plaintiff accepted from two of the (3) three the sum of $27,500.00 for and on account of the injury and loss which the corporation had sustained, and a judgment of dismissal in their favor was according entered.

"That this judgment, entered under the stipulation of the parties, was a retraxit there can be no doubt.

"The findings disclose that payment was made by the two defendants upon account of the judgment order against the three jointly," and said supreme court further decided this case in language as follows: * * * The plaintiff in this case by accepting $27,500 from the two defendants for and on "account of the joint trespass of the three and by releasing them has released his claim against the third," and therein the court erred.

The said judgment of the supreme court of said State thus interpreted and adjudged a mere dismissal or retraxit given by the nominal plaintiff after recovery of a judgment in favor of the plaintiff in error against a defendant not dismissed from the action, and judgment thereon as a release and satisfaction of the whole sum due this plaintiff in error, although only a part of said debt or sum due was paid and the judgment rendered and thereafter entered up, was for the unpaid balance alone.

That this judgment and decision of said supreme court of
125 said State, therefore, was rendered without due or any process of law and deprived this plaintiff in error of its property without due process of law, contrary to the 14th amendment to the Constitution of the United States, and the said judgment was and is repugnant to said Constitution, and by said judgment the said State has denied to plaintiff in error and to its stockholders the equal protection of the law.

The only release given was the dismissal given by the nominal plaintiff and the judgment entered thereon in favor of Thompson and Wilson, leaving Thomas (defendant in error) liable for the

balance, and this was, as the said court decided, "given after the court, by its order for judgment, had fixed the responsibility and the liability of the three defendants."

The appellate court of said State, in holding and by its judgment deciding that this procedure released defendant in error from all liability, deprived plaintiff in error of its property, to wit, said debt and judgment, without due process of law.

The supreme court of said State erred in deciding that such procedure might lead to fraud or oppression of defendants or any one.

The said court erred in deciding that the payment of part of said claim satisfied the claim in full, whereas in this case it was not so intended by the trial court or by any of the parties and was not so found or decided by the trial court, but the contrary.

126 The said supreme court of said State erred in stating and deciding that "the injustice of such procedure would be reason enough for the creation of a rule to apply to this case," as the plaintiff in error and its stockholders represented by plaintiff are the real party injured and unjustly dealt with by said State courts, and the defendant in error, R. P. Thomas, was benefited and helped, not harmed, by plaintiff or plaintiff in error, nor unjustly treated by the trial court or by any one.

The said court erred in deciding that "where several joint tort-feasors have been sued in a single action a retraxit of the cause of action in favor of one of them operates to release them all," since a retraxit differs from an accord and satisfaction and from a judgment and satisfaction and from a satisfaction and differs from a release, and in applying such erroneous rule to this case at bar the said supreme court, by its judgment reversing the judgment plaintiff in error had recovered against defendant in error and ordering judgment in favor of defendant in error because of a dismissal given to defendants Thompson and Wilson by the nominal plaintiff after recovery of said judgment in favor of plaintiff in error, took from and deprived this plaintiff in error of its property in said unpaid balance of said judgment, to wit, in said judgment as finally entered up, and deprived said bank of said property without due or any process of law, and denied to plaintiff and the other stockholders of said plaintiff in error the equal protection of the laws by such act and decision, contrary to the Constitution of these United States.

127 Wherefore plaintiff in error prays that a writ issue to review said judgment and decree of said supreme court of said State, and that the judgment of said supreme court of said State so rendered against it in this cause on the 22nd day of July, A. D. 1896, be reversed, and that judgment be ordered entered herein on the findings in favor of plaintiff in error for the sum found due it from said R. P. Thomas, defendant in error, with interest, or that the said judgment of the said supreme court be reversed and an-

nulled and said supreme court be commanded to affirm the judgment of said trial court, to wit, of said superior court.

EDDY KNAPP AND
A. W. THOMPSON,
Attorneys for said Plaintiff in Error.

[Endorsed:] No. S. F., 177. In the supreme court, State of California. On error to the Supreme Court of the United States. The California National Bank, plaintiff in error, *vs.* R. P. Thomas & J. Chetwood, Jr., defendants in error. Petition for writ of error and assignment of errors. Filed Oct. 19, 1896. T. H. Ward, clerk, by A. W. Johnson, deputy. E. G. Knapp, Mills building, sixth floor, attorney for pl'ff; rooms 5 and 34, San Francisco, Cal.

128 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of the State of California, before you, being the highest court of law or equity in the said State in which a decision could be had in the said suit between John Chetwood, Jr., plaintiff and respondent, and The California National Bank of San Francisco, defendant and respondent, and Richard P. Thomas, defendant and appellant, wherein was specially set up and claimed by the said California National bank and by John Chetwood, Jr., plaintiff and respondent, in its behalf a title and right under the Revised Statutes of the United States, sec. 5136 and other sections, and under the Constitution of the United States and the fourteenth amendment thereto, and the decision was against said right, title, and privilege, and said decision deprived said California National bank of its property without due process of law and contrary to the law of the land, and denied it the equal protection of the laws, a manifest error hath happened, to the great damage of the said California National Bank of San Francisco, as by *his* complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the 23rd day of November next, in the said Supreme Court of the United States to be there and then held, that, the record and proceedings aforesaid be- inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Su-

preme Court of the United States, this
Seal U. S. Circuit Court, Northern Dist. Cal. 24th day of September, in the year of our Lord one thousand eight hundred and ninety-six*th*, and of the Independence of the United States the one hundred and 21st.

W. J. COSTIGAN,
Clerk of the Circuit Court of the United States for the Ninth Circuit and Northern District of California,
By W. B. BEAIZLEY,
Deputy Clerk.

The above writ of error is hereby allowed.
STEPHEN J. FIELD,
Justice of the Supreme Court of the United States.

129 [Endorsed:] S. F., 177. United States Supreme Court. The Cal. Nat. Bank of S. F., plaintiff in error, *vs.* R. P. Thomas, defendant in error. Writ of error. Filed Oct. 19, 1896. T. H. Ward, clerk, by A. W. Johnson, deputy.

130 UNITED STATES OF AMERICA, *ss:*

To Richard P. Thomas, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 23d day of November, A. D. 1896, pursuant to a writ of error which has been allowed and filed in the office of the clerk of the supreme court of the State of California, wherein The California National Bank of San Francisco is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and decision in the said writ mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this 24th day of September, A. D. 1896, and of the Independence of the United States the one hundred and twenty-first.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

131 [Endorsed:] S. F., 177. In the Supreme Court of the United States. The California National Bank of San Francisco (pl'ffs in error) *vs.* Richard P. Thomas, defendant in error. Citation. Filed Oct. 19, 1896. T. H. Ward, clerk, by A. W. Johnson, deputy.

Personally served on R. P. Thomas Oct. 19th, 1896.

E. G. K.

Personal service of within citation on said def't in error and on his attorneys by copy admitted this 19th day of October, A. D. 1896.

PIERSON & MITCHELL,
Attorney- for R. P. Thomas, Defendant in Error.

Service of the foregoing writ of error and citation admitted the 6th ——, 1889.

ROBT. A. FRIEDRICH,
Att'y for T. K. Stateler, D'f't in Error.
J. A. STEPHENS,
Formerly Att'y for R. P. Thomas.
AYLETT R. COTTON,
Att'y for S. P. Youny.
MASTICK, BELCHER & MASTICK,
Attorneys for R. A. Wilson.

Service of the foregoing writ and citation are hereby admitted as a def't in error, but this def't in error asks that he be entered as the plaintiff in error herein instead, and for that purpose, if necessary, said writ be amended in that regard.

JOHN CHETWOOD, JR.,
In Propria Persona.

132 *Clerk's Certificate.*

In the Supreme Court of the State of California.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO *et al.*, Pl'ffs in Error,
vs.
R. P. THOMAS *et al.*, Def'ts in Error.
} No. S. F., 177.

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 123, both numbers inclusive, and page 100½, contain a full, true, and correct transcript of the proceedings in the case above entitled, and that the same together constitute the return to the annexed writ of error.

And I further certify that at the time said writ of error was filed in the office of the clerk of said court the plaintiffs in error lodged with me as clerk of said court, in said office, a copy of said writ for each of the defendants in error, six in all. I further certify that under the rules of court the petition for hearing in bank filed herein on August 12th, 1896, operated as a stay of all proceedings in this cause until the order made thereon, filed August 22nd, 1896, copy of which is included in the foregoing record.

Witness my hand and seal of said supreme court this 6th day of November, 1896.

[Seal Supreme Court of California.]

T. H. WARD, *Clerk*,
By R. A. MARSHALL, *Deputy*.

Endorsed on cover: Case No. 16,452. California supreme court. Term No., 673. The California National Bank of San Francisco, plaintiff in error, *vs.* Richard P. Thomas. Filed December 17, 1896.

Brief of Rae & Knapp for P. C. Co

Filed May 14, 1897.

16452

Supreme Court of the United States

OCTOBER TERM 1896

No. 673.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,

PLAINTIFF IN ERROR,

vs.

RICHARD P. THOMAS,

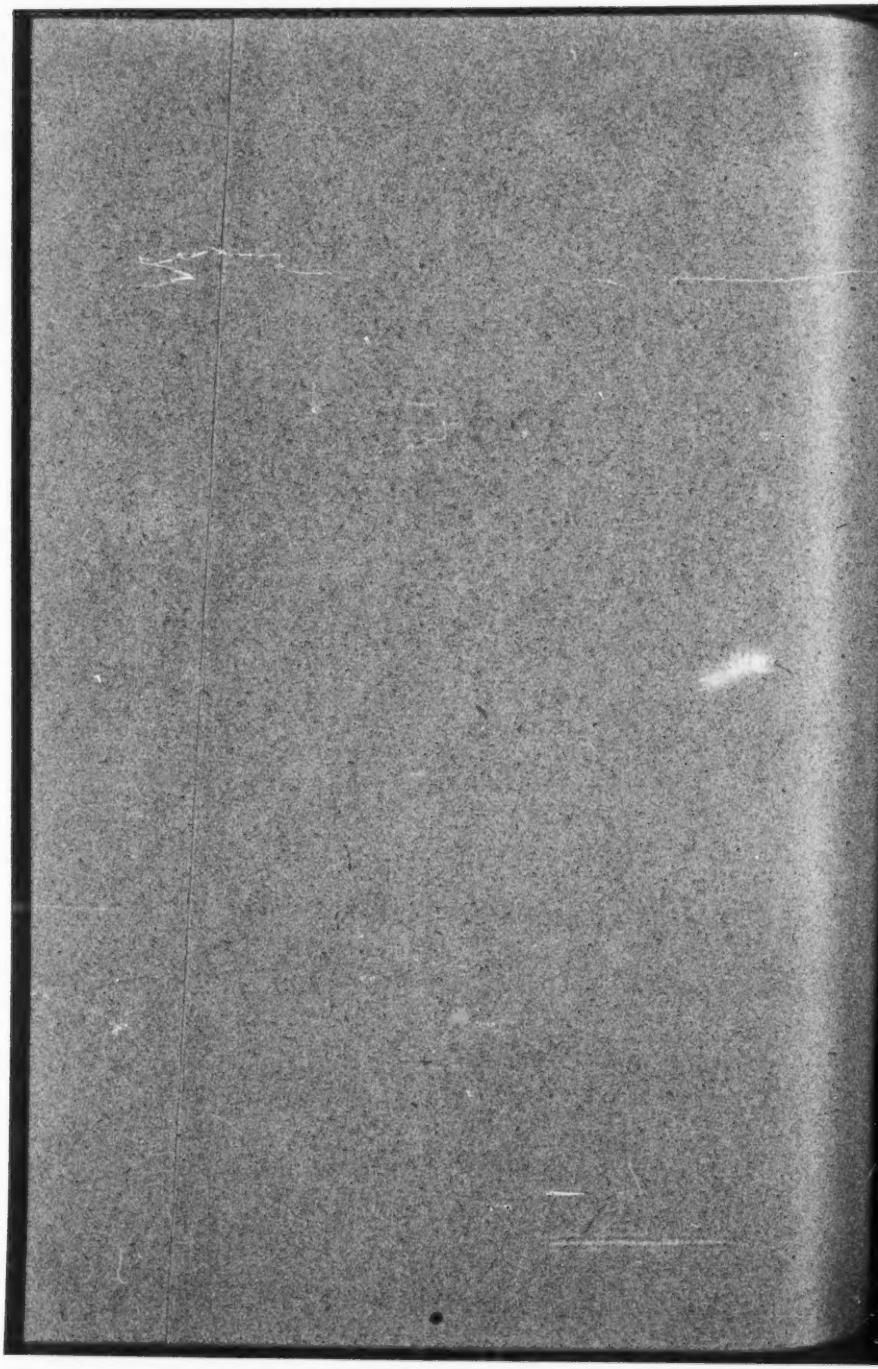
DEFENDANT IN ERROR.

In Error to the Supreme Court of California.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS.

FILED MAY ——— 1897.

ROBERT RAE (Chicago),
E. G. KNAPP (San Francisco),
Counsel for Plaintiff in Error.



Supreme Court of the United States. October Term, 1896.
No. 673.

THE CALIFORNIA NATIONAL BANK, OF SAN FRANCISCO, Plaintiff in Error,

v.

R. P. THOMAS, ET AL., Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS.

This action was brought originally by a stockholder of the plaintiff in error, a National Bank, against three persons, its directors and officers, the corporation itself, and its receiver. The suit is brought by plaintiff, as a representative of the stockholders, and for the benefit of the Bank.

The complaint avers the organization of the Bank under the United States laws, the execution of articles of association, election of Directors, and adoption of a code of by-laws, in force ever since. It then sets out in full the provisions of the code of by-laws adopted by the Directors, which fix and define the duties of the officers, Executive Committee, and President and Vice-President. Section 17, defining the duties of the President, begins with these words:

"The President shall have general control and supervision "of all affairs of the Bank (Tr., p. 6)." It continues, (p. 7), "He shall perform all duties required of him by the Bank "Laws of the United States, or its proper officers," and concludes, "He shall also have supervision of all employes of the "Bank, and may suspend them when necessary, reporting his "action and occasion thereof to the Board of Directors at its "next meeting."

Section 7 provides for appointment of an executive committee, consisting of the President and two other directors, "who "shall have and exercise immediate supervision of all the "officers and business of the Bank, (p. 6)."

Having set up (p. 4) that the three defendants, Thomas, Thompson, and Wilson, were Directors at all times mentioned, the complaint continues (p. 8) to aver their appointment and election as the Executive Committee, that of the first named as President, and the last as Vice-President, in October, 1886, and their continuance in office, and "that (p. 10) upon their "said election and appointment as such officers said three "defendants severally and as such President, Vice-President, "and Executive Committee, duly accepted the positions of the "respective officers, and as provided in the above mentioned "code of by-laws, and uly accepted the trusts and obliga- "tions to perform each and all of the duties therein prescribed, "with due skill, care, attention, prudence, and fidelity."

(p. 12.) That well knowing each and all of the said facts above recited, and said three persons above named, defendants Thomas, Thompson, and Wilson, "severally being fully "aware of the nature of said trust, and the duties thereof, "accepted and retained the said trust, and unto the said cor- "poration promised faithfully to discharge the same, and "each and all of the said duties thereof in a proper, careful, "and judicious manner, and with due care, attention, skill, "prudence, diligence, and fidelity."

(p. 13.) That the Bank began business soon after, but that these defendants did not regard their aforesaid duties, nor their aforesaid promises, but wholly disregarded the same, and contriving together to injure and deceive the corporation, neglected and omitted, without excuse, to direct the business of the Bank, and negligently permitted the Cashier to control and manage the whole business.

Then follow allegations of various transactions, three of which are infractions of Section 5200, Rev. Stat., being each more than one-tenth of the Bank's capital, and not being secured drafts, or in good faith, or discounts of commercial paper by actual owners.

The losses by all these transactions are alleged to have amounted to $400,000.00, resulting in a destruction of surplus and capital, from which followed failure, receivership, and an assessment by the Comptroller of $75,000.00.

It is then stated that the Corporation, the Comptroller, and Receiver had each been requested, and each refused, to bring this suit on behalf of the Bank, and that the Bank and the Receiver are, therefore, parties defendant, because they would not come in as plaintiffs.

Then follows a prayer for an accounting, that the three defendants restore this $400,600 to the Bank, and be held jointly and severally liable, and for general relief.

The answer of Thompson and Wilson admits these by-laws, but sets up others (p. 48-49), which it is claimed relieved two of the defendants of some of their aforesaid duties as Directors and members of the Executive Committee, by placing certain duties on the Cashier. Defendant Thomas filed no answer, but adopted that of his co-defendants, making the question of his liability purely a legal question, and one of construction under said by-laws.

The cause was referred to a referee, as a cause in equity, the Court desiring further proof after trial and an order holding the defendants liable. His report (p. 63) is that three certain persons owed the Bank, at different dates, August 6, and December 15, 1888, upwards of $20,000, the limit under Section 5200.

Thereupon the two defendants, Thompson and Wilson, paid into Court $20,000.00 and $7,500.00 respectively, and were, with the consent of the Court, dismissed, and the action then proceeded against R. P. Thomas, the Bank and the Receiver as the only defendants.

The Court finds the by-laws set out in the complaint, the facts showing knowledge in the President of a report of an auditing committee, and of the condition of the Bank, and of the making of improper and unauthorized loans (pp. 80-81), and (p. 85) that "it appears from books, papers, and documents of said Bank, to which said President, defendant "R. P. Thomas, had full constant access," that the said three borrowers named in the complaint, referee's report, and decision, were respectively indebted to the Bank in the amounts stated at the dates given above, and that these were improper uses of the moneys of the Bank, which he could easily have prevented.

The total loss by these loans is found to have been $166,919.00, and after giving credit for the amount paid into Court, judgment is entered in favor of the plaintiff, for the use and benefit of the Bank, and against defendant Thomas for $139,419.00. The Bank did not complain of this, but Thomas appealed, and the Appellate Court decided, first, that the suit was not upon a cause of action *ex contractu*, but upon one purely in tort.

That the averments of the promise by defendants to dis-

charge their trust are unnecessary, and do not affect the cause of action. "That the law imposed upon them the duty "of using due care, when they agreed to discharge their duties "as members of the Executive Committee."

That for these wrongful acts defendants are liable in tort, and "the fact that there might be another cause of action "*ex contractu*, is a matter entirely apart."

The opinion then proceeds to discuss the findings, and holds that they show a several liability, if any, for breach of the duties of the President, and that the liability pleaded is for joint negligence of the three defendants as members of the Executive Committee. But the Court denies that any several liability as President, for breach of his duties as such, rested on defendant Thomas, either under or by virtue of said by-laws or contract pleaded, or at all. Indeed, in one part of its opinion the Court denies that any several liability is pleaded. The Court then go on to say that because the findings make out a case of several liability, while the case pleaded is one of joint liability, or none, the judgment must be reversed. But they further proceed to decide as a necessary corollary from the conclusion that there is no several liability upon defendant Thomas (the President), that the payments made by his co-defendants before judgment, and the dismissals as to them were a retraxit, which, it holds, is the equivalent of a release and satisfaction, where the suit is "against joint tort "feasors," and thereupon orders judgment reversed, and orders further that judgment be entered in the trial Court in favor of defendant Thomas and against plaintiff, finally ending the litigation.

The Bank and plaintiff sued out this writ of error, and we are met by a motion to dismiss.

POINTS IN THE CASE.

It plainly appears from the foregoing that whether the liability sought to be established in this action is to be called *ex contractu* or not, the suit and the recovery is for a breach of the duties imposed on the President by the by-laws of the Bank, and the Revised Statutes, the laws of the United States.

The plaintiff throughout, by the averments of his bill, by his

prayer for a joint and several judgment, by his consenting to a dismssal of two, and then moving for and taking a judgment against the third, did everything it was possible to do to base and predicate the claims of the corporation he asserted upon the contract of agency by-laws of the Bank, and the laws of the United States, independent of any common law lability, and to hold defendant Thomas liable severally as President, by reason of the by-law 17, in addition to and cumulative of the liability existing under or imposed by by-law 7 upon him as member of the Executive Committee.

It has been held by the Circuit Court of Appeals that where a cashier gives bond to the Bank, a suit on that bond involves a federal question, and is within the jurisdiction of the United States Circuit Court, becauses it raises a question as to the duties of the Bank's officers, even without a recital that he will faithfully perform the duties of his office, "according to "law and the by-laws of the Bank." That the cashier's duties are not to be defined by State Courts. Walker vs. Windsor Bank, 56 F. R., 76-80. The Acts of July 12th, 1882, Sec. 4, (22 St., 163), and of August 13th, 1888, (25 St., 434), do not place National Banks under any disadvantage in raising so called federal questions (same case), and Petri vs. Bank, 142 U. S., 650. And where, as here, plaintiff distinctly makes the claim to be entitled to enforce the duties of the Bank's officers according to the terms of the by-laws, the right to define the duties of the President to make those particular by-laws, and to claim the sanction of a liability arising by breach of each clause is in issue. The claim to hold the President liable under the by-laws (since they have no force or virtue apart from the laws of the United States) is a claim made under those laws. That being denied, as here, this Court has jurisdicton to re-examine the decree. The right to fix and define the supervisory powers of the President in the contract of agency itself is in issue, and that alone gives the Court jurisdiction. Osborn vs. Bank, 9 Wheat., 823-4, and the language of Justice Marshall in that case quoted in Pac. R. R. removal cases, 115 U. S., 1-13.:

"When a bank sues, the first question which presents itself "and which lies at the foundation of the cause is, Has this "legal entity a right to come, not into this Court particu-"larly, but into any Court? This depends on a law of the "United States.

"The next question is, Has this being a right to make this "particular contract? If this question is decided in the nega- "tive, the cause is determined against the plaintiff, and this "question, too, depends entirely upon a law of the United "States."

Throughout the claim is made that it is by reason of these special peculiar provisions of the by-laws that the defendants are liable. This of itself gave plaintiff a right to hold defendant Thomas severally liable under by-law seven, as well as jointly with the other defendants under Sec. 17, whether it be upon his contract to observe those duties or in tort for failure to do so.

Section 5136, Rev. Statutes, gives the bank the distinct right to "define the duties" of its President and other officers, and to regulate by its by-laws "the manner in which its gen- "eral business shall be conducted." This, plaintiff in error undertook to do, and this suit is an assertion of that right. The claim of the plaintiff to hold the President liable for the acts of the cashier is based upon the fact that he, the President, by the by-laws of the bank, had general supervision of the cashier, with power to suspend him, and general control of him and of the affairs of the bank. Apart from the provisions of these by-laws, to wit: by general law, it is very doubtful if the President, as President, would have any control over or responsibility for the acts of the cashier. Merchants vs. State Bank, 10 Wall., 604; Thompson on Corporations, 4619-20; Morawetz on Corporations, 537-8.

If duties were prescribed by a State Statute they must give way to Federal Statutes. Gulf etc., vs. Hefley, 158 U. S., 98-105; Davis vs. Elmira Savings Bank, 161 U. S., 275; McClellan vs. Chipman, 164 id., 347.

Where, then, the duties of its officers are defined by the bank under the authority of a Federal Statute, those duties are the ones the President must faithfully perform, independent of custom or the general law, which must yield to the terms of the positive enactment. This Statute and by-law fix the measure of the President's duties. That, at any rate, is the claim made and denied in the case at bar.

The State Court clearly denied plaintiff a recovery on the alleged liability of the President as such.

The sufficiency of the facts pleaded and relied on is a question arising under Federal law. Mitchell vs. Clark, 110 U. S., 633.

The Act of July 12, 1882, places National Banks, so far as jurisdiction is concerned, in the same position as State banks. But it is submitted that neither that Statute nor the later Act mentioned above deprive this Court of its appellate powers over decrees of State Courts, where a claim is made that brings the case within Sec. 709 of the Revised Statutes, which could not be made by a State bank, but which arises and is based on the laws of the United States, and depends upon the effect to be given to a Statute of the United States and to the by-laws and contracts of a National bank, made under and by express authority of such Statutes, ~~and is~~ independent and apart from general law or State legislation. Such a claim could not be set up or made by a State bank, save under a special Statute. This Statute gives this right to National banks.

It is for the Federal Courts to determine questions arising under Federal laws, and to interpret and give effect to them, and to the by-laws made and authority exercised under them. If not, then the duties of National bank officers may be defined by the State Courts, as they see fit to construe the law of negligence and the power of Directors of the bank expressly given by the Federal Statute is destroyed. (Walker vs. Windsor Bank, supra, distinguishing Whittemore vs. Bank.

And this Court has power to review a judgment deciding that a National bank had no power to make the contract sued upon. Logan Co. Bank vs. Townsend, 139 U. S., 67.

A defense of immunity from debts because of change from a State to a National bank raises a Federal question. M. Bank vs. Claggett, 141 U. S., 520.

National banks are instrumentalities of the United States Government, and as such necessarily subject to the paramount authority of the United States. Davis vs. Elmira National Bank, 161 U. S., 275; McClellan vs. Chipman, 164 U. S., 347.

This case holds that an attempt by a State to define their duties or powers of those given their officers under the laws of the United States frustrates the purposes of the National Legislature or impairs the efficiency of these agencies of the Federal Government.

The rule stated in this case is the cessation of the operation of State and general laws, whenever they conflict with the laws of the United States or frustrate the purposes for which the National banks were created, or impair their efficiency to discharge the duties imposed on them by the laws of the United States. (p. 357.)

The claim that the State had no right by its Legislature to define the duties of cashier of a National bank is a Federal question. This admits of no doubt. A defense in a State Court that the cashier of a National bank is amenable to no law but a law of Congress, and that a State Legislature has no power to prescribe his duties, raises a Federal question of which this Court has jurisdiction. Waite vs. Dowley, 94 U. S., 527.

The Supreme Court has jurisdiction to review a decision of a State Court that a bankrupt's discharge is no bar to an action. Dimmock vs. Revere Co., 117 U. S., 599.

So where the effect of a discharge in bankruptcy upon the right to enforce a lien is necessarily involved. Long vs. Bullard, 117 U. S., 617.

It may be conceded that if the duties of the President and his liability were exactly the same at common law as under the Statute, and the by-laws, that the law as the Court say in its opinion which imposes a duty, is a doctrine of general jurisprudence, though it is not clear that it is not the Federal Statute itself; but where, as here, the duties, responsibilities and liabilities, as fixed and defined by the bank, are greater and other than those of a President under general law, independent of usage, the plaintiffs may surely claim under United States laws to hold the President to that stricter accountability created under and by those laws.

In Mays vs. Fritton, No. 533, 131 U. S., CXIV, it is said briefly and pointedly:

"The claim set up in the State Court being founded on the "bankruptcy Act, and the decision being adverse, the case is "within the very words of the Judiciary Act of February 5, "1867, giving this Court jurisdiction." The same rule, it is submitted, applies in the present case.

Where the decision of the State Court was against the right claimed by defendent under Act of Congress in relation to stamping deeds, making them inadmissible in evidence, the question, however frivolous, is one of which this Court has jurisdiction. Hall vs. Jordan, 15 Wall., 393.

Where decision is against an authority set up under an Act of Congress, this Court has jurisdiction. McGuire vs. Mass., 3 Wall., 387.

The Appellate Court denied the bank's right to make any contract of agency. It is said in Morawetz on Corporations, Section 550, liability of directors:

"If an agent is guilty of an unauthorized act * * * the "latter may hold the agent responsible, both for the tort and "for the breach of the contract of agency.

"An agent may likewise be liable in equity."

But the Supreme Court, in case at bar, say the contract pleaded is a thing apart, and does not affect the cause of action. Where a written opinion, stating the grounds of the decision, is required by State law (as in California), this Court will examine such opinion to see whether any Federal question is involved. Constitution, Article 2, Sec. VI; Gross vs. U. S. M. Co., 108 U. S., 477.

We submit that these allegations of the by-laws and the contract of agency are the foundation of the bank's right of action, and its claim to hold defendant Thomas severally liable for the whole loss, and that being denied, this Court can review the decree.

The action takes its character from the pleadings, and on the same facts may be in contract or tort as the pleader determines, even under the California practice. Stark vs. Wellman, 96 Cal., 400.

It may be unimportant on this motion whether the action sounds in tort or contract, but as the claim to hold the President liable and the several judgment given against him is based upon a liability imposed under and by virtue of Section 5136, which liability, as well as recovery, were both denied, the decision being adverse to the claims made under the United States laws, this Court has jurisdiction to review the same. Woodruff vs. Miss., 162 U. S., 292; Mays vs. Fritton, 131 U. S., CXIV.

The charges in the bill, it is submitted, in addition to the foregoing, make out a case against the directors of several liability under Sections 5204 and 5239, Revised Statutes, which has been held to attach without the suit by the Comptroller to forfeit the franchise. Stephens vs. Overstoltz, 43 F. R., 771.

And the claim being made that defendant Thomas is severally liable for the whole loss, and denied by the State Court, this Court has jurisdiction to re-examine the judgment. The three loans in excess of one-tenth of the bank's capital are each particularly the last one, violations of the Statute; the referee's report and the Court's decision make it clear that they were mere loans on personal indebtedness of the individuals, and neither bona fide discounts of secured drafts nor purchases of commercial paper from actual owners. This would subject

Thomas to the several liability claimed and enforced by the trial Court, but denied by the Appellate Court; and this denial gives this Court jurisdiction of the writ of error, even though it might hold the judgment proper on this ground by reason of failure to allege a prior suit by the Comptroller forfeiting the bank's franchise. Bailey vs. Mosher, 63 F. R., 488.

Further, the bank and plaintiff claimed also the right to maintain this as a suit in equity against its three unfaithful trustees. The general right to sue in equity is given by Section 5136. The right to sue in equity in this particular case exists, perhaps, independent of Statute, and the corporation may sometimes elect to sue at law or in equity. Charitable Co. vs. Sutton, 2 Atkins, 401; Brinkerhoff vs. Bostwick, 88 N. Y., 52; quoted 99 N. Y., 193, and S. C., 105 N. Y., 572, distinguishing Hun vs. Cary, cited in opinions in the record; Horn S. M. Co. vs. Ryan, 42 Minn., 196; Ackerman vs. Halsey, 37 N. J. Eq., 356; Trustees vs. Bossieux, 3 F. R., 818; Witters vs. Lowles, 31 F. R., 43 id., 405.

Each case must depend on its special facts and circumstances. Briggs vs. Spalding, 141 U. S., 132. Here it is submitted that we had a right to elect to sue at law or in equity, and having elected to frame a complaint for an accounting, an equitable proceeding, we had a right under Section 5136 to maintain that suit as fully as a natural person, and so avoid the applications made of the harsh and technical common law principles of retraxit, etc., etc., and this claim being denied by the Court's decision that the cause of action is purely legal, when it is plainly equitable at the bank's election, gives this Court jurisdiction over the writ.

Whether the last two points are or are not well taken, this same liability to make good the whole loss attaches, and the right to recover of Thomas, after dismissing as to the others, exists by virtue of the facts showing a separate duty imposed on the President as such, as those duties are defined in the by-laws under authority of the Statute. The decision necessarily denies this claim of the corporation, thereby denying all force and validity to those by-laws, and denying the validity of the Statute which authorizes the bank by its Board of Directors to define the duties of the President of the bank.

We think this gives a right to the writ of error which can not be taken away by any construction of the Acts limiting the jurisdiction of the Federal Courts in cases of National banks.

Further, those Acts distinctly save the jurisdiction in suits

between such banks and officers of the United States, and suits for winding up the affairs of a National bank.

The receiver is such officer (ex parte Chetwood), and he is a party and a necessary party to this suit. The trustees defendant are entitled to have all possible claims against them settled in one suit. Hand vs. N. Bank, 55 How. Pr., 231.

This suit is not brought strictly by direction of the Comptroller, or of the Receiver, but it is to enforce a right of action resting in the Receiver primarily, it has been held. And a controversy appears at once to have arisen as to the right to control the cause of action and the proceedings, which would make it a suit between the receiver on one side and the bank on the other. In this case, by the payment of this fund of $27,500.00 into Court and recovery of the judgment, the suit became at once one between the corporation and the receiver and later his successor, the agent, a contest as to which party should control the action and enforce the judgment, the plaintiff and the corporation and its directors, or the receiver and the agent claiming to be his successor.

The meaning of the word between is not clear (Petri vs. Bank, supra, 142 U. S., 650), but it is submitted that the case at bar is a suit between the bank and the receiver within the saving clause of the Statute.

We respectfully submit that a Federal question was and is clearly involved in the determination of the case..

II.

Was that right claimed by the bank specially set up in the State Court?

The right to recover on the duties defined in the by-laws was set up and claimed *ex industria*—the facts showing the liability of the directors by reason of their violations of the Statute, as well as infractions of the by-laws certainly were set up.

The prayer of the bill claimed a right to hold them to account as such directors, and to have a joint and several judgment against them, and by dismssal of the action as against all, save one, this became a prayer for a several judgment against him.

The cases do not hold as defendant in error would seem in his brief to claim that the plaintiff in error must specify the

Statutes on which he bases his right, in order to give this Court jurisdiction.

As was said by the Honorable Chief Justice Fuller in the opinion in Woodruff vs. Mississippi, 162 U. S., 292-298:

"If, by the adjudication (of the State Court) a right pos-
"sessed by the plaintiffs in error as bondholders (here as a
"National bank), under the Constitution and laws of the
"United States was necessarily denied, then this Court has
"jurisdiction to review the judgment on writ of error."

If the Supreme Court can see by an examination of the record that the Federal question was raised and decided adversely to plaintiff in error, it is not necessary that it be set up in pleadings, or offer, or an objection to evidence. Furman vs. Nicoll, 8 Wall., 44; Crowell vs. Randall, 10 Pet., 368; Armstrong vs. Treas., 16 Pet., 281; Beer Co. vs. Mass., 97 U. S., 25.

If the pleadings make out a case that comes under the United States Constitution or laws, that is enough. It is unnecessary to set out the provisions of law relied on. Bridge Props. vs. Hoboken, 1 Wall., 116; Furman vs. Nicholl, 8 Wall., 44.

It is not always necessary that the Federal question should appear affirmatively on the record or in the opinion to give jurisdiction, if an adjudication of such question was necessarily involved. Kaukauna W. Co. vs. Green Bay Co., 142 U. S., 254.

Where the State Court did not in terms pass upon the claim distinctly made there, but the final judgment necessarily involved an adjudication of that claim, this Court has jurisdiction to review the case. Chicago Co. vs. Needles, 113 U. S., 574.

The question need not have been formally raised, but it is sufficient if it appears by clear and necessary intendment that a Federal question was raised and presented to the State Court. Crowell vs. Randall, 10 Pet., 368; Armstrong vs. Athens Co., 16 Pet., 281; Hickie vs. Starkie, 1 Pet., 94; Bridge Props. vs. Hoboken Co., 1 Wall., 143; Furman vs. Nicoll, 8 Wall., 44; Murray vs. Charlestown, 96 U. S., 442; Detroit Ry. Co. vs. Guthard, 114 U. S., 136; Eureka Lake Co. vs. Yuba Co., 116 U. S., 410.

Where the decision of a Federal question is necessarily involved the Supreme Court has jurisdiction, although no mention is made of the Federal question in the opinion. Arrowsmith vs. Harmoning, 118 U. S., 194.

It decides a Federal question by affirming a decision of the

Court below on a petition for review, setting forth the decision of such lower Court. Stewart vs. Kahn, 11 Wall., 493.

When a decision of the Federal question is necessary to any final judgment in the case, or no non-federal question is decided by the State Court broad enough to sustain the judgment, it will be reversed if error is found. Murdock vs. Memphis, 20 Wall., 636; Minnesota vs. Batchelder, 1 Wall., 109.

Where the record shows no other reason why the State Court sustained a demurrer to the plea of tender than that it was made in United States legal tender notes, this Court has jurisdiction to review the judgment. Dooley vs. Smith, 13 Wall., 604; affirmed legal tender cases, 110 U. S., 438.

Where the claim is made for the first time upon error in the highest Court, and the Court's decision is merely that the errors assigned have been examined and understood, this was deciding against the privilege claimed under an Act of Congress. Davis vs. Packard, 6 Pet., 41.

In the case at bar, therefore, it was surely unnecessary to do more than was done to raise Federal question. We respectfully submit that a Federal question clearly appears, and that the claim, based on the United States Statute, is specially set up and claimed in the proper way by the proper party at the proper time.

III.

But the defendant in error contends that even if there be a Federal question that the decision of the State Court was based on another ground.

This is not the case. The other grounds of objection to the judgment of the trial Court were none of them broad enough to warrant anything more than a mere reversal of the judgment. The opinion so states in express words. The judgment and decision directing the trial Court to enter up final judgment on the record against plaintiff and plaintiffs in error, without which the judgment would not be final, is based solely upon the ground stated, to wit: that which denies any several liability whatever in defendant Thomas.

Had the Court recognized liability resting on the defendant by virtue of by-law 7, the case might have been reversed for the assumed error that the findings depart from the strict case made in the bill; but it would have been impossible, under the California practice, to enter up judgment on the findings against the claim made by the plaintiff under United States law.

That question arises on the record by reason of the statement of the President's duties under the by-laws and his agreement to perform them, pleaded in the bill, admitted by the answer of defendant, and found by the trial Court.

The last ground of the decision, viz.: that the payment made by his co-defendants released defendant Thomas, is based by the Court itself upon the assumed fact that no several, other, or different liability rested on him from that imposed by law upon the others.

That is precisely the point involved and raised and depending upon a construction of the by-laws and the right of the bank to define the duties of its President, and to impose other and greater responsibilities upon him than either custom, local or State laws may warrant, a right valuable to the bank, as it gave the power to withdraw the President's duties from the hazy and uncertain domain of customary or local law, and to fix and define, make certain and definite, clear and plain, his powers and his duties, by positive enactment and contract.

It gave the bank power to define its President's powers in anyway it saw fit, and here the claim is made that this was done in the by-laws and by the contract of agency upon which the pleader declared, and that contract of the President, as President, was several, his duties as such separate and distinct and other than and cumulative upon the duties imposed on the executive committee and his liability as President, distinct from that of the other members of the committee, and not simply a joint or joint and several liability, resting equally on them and him.

If there is a Federal question at all in the case, if the bank's claim to hold its President liable as such is one made under the laws of the United States, and that it seems is so under broad principles, Osborn vs. Bank, and Woodruff vs. Miss., then the decision in this case necessarily involved that Federal question; for the assumed doctrines of retraxit, etc., etc., are applied by the Court solely because it had decided the defendants were joint tort feasors, and that there was no liability whatever on the President as such.

The plaintiff pleaded this claim, the trial Court found in favor of it, and based its decree thereon. Its first order (p. 59) mentions no amount nor amounts, and despite such order the suit having proceeded in all respects as a suit in equity in that Court, it was competent for it to assess damages in different amounts, or, if it saw fit to approve a compromise in whole

or in part, the money being paid in, subject to its own orders. Leeds Est. Co. vs. Shepherd L. R., 36 Ch. D., 787-807.

Even the referee's report was merely advisory. Sweetsen vs. Dobbins, 65 Cal., 529.

The other questions of practice were not, under California procedure, broad enough to warrant the judgment rendered. The Court was not content to order a simple reversal of the judgment, but ordered a judgment against plaintiff, whereby he and the corporation would take nothing by the action.

A mere reversal of a judgment by the Supreme Court has the effect to remand the cause for a new trial. Falkner vs. Hendy, 107 Cal., 49.

Where findings are insufficient to support the judgment, or contrary to the evidence, the Appellate Court cannot supply findings, but will reverse the judgment and remand the cause for a new trial. Russell vs. McDowell, 83 Cal., 70; Smith vs. Los Ang. etc. Co., 78 Cal., 289.

To do otherwise would be to exercise original, not appellate jurisdiction, which the Appellate Court cannot do. Ellis vs. Jeans, 26 Cal., 272; Board of Ed. vs. Martin, 92 Cal., 209.

It would seem hardly necessary to cite authorities on this point where the Court, as here, so plainly rest that portion of their judgment, which alone makes it a final judgment upon the objection stated to be more serious than those which would necessitate a mere reversal.

When, in a suit from a State Court, there is a Federal question, and it does not appear upon which of the two grounds the judgment was based, then, if the independent ground was not a good and valid one, or not of itself sufficient to sustain the judgment, the Supreme Court of the United States will take jurisdiction of the case. Johnson vs. Risk, 137 U. S., 300.

If the Federal question controls the whole case, or there has been no decision by the State Court of any other matter sufficient to sustain the judgment, then this Court has jurisdiction and will reverse the judgment. Murdock vs. Memphis, 20 Wall., 590.

The language of the opinion when passing from the points made on the findings to the final point that, because Thomas was not severally liable, but a joint tort feasor, he could go scot free, is as follows:

"But while this error would necessitate a reversal, there is "yet a more serious objection to be considered."

This more serious objection is stated to be that because

Thomas was a joint tort feasor simply, not liable as President at all, but liable with his co-defendants, and not otherwise, that therefore the common law doctrine of retraxit operated to relieve and release him under the proceedings in this cause.

This conclusion that his debt was paid, his default made good by the partial payment his co-defendants made, the Court distinctly, plainly and repeatedly throughout the whole opinion bases upon the denial of any several liability or separate responsibility resting on Thomas, the President, as president.

The former is made to depend upon the latter, and if, as we believe, the Court must decide, the former involves a Federal question, so likewise must the latter.

The Board claimed a right to hold its President severally liable to it, because of its power to prescribe and define his duties, to make the contract of agency with him and hold him accountable for breaches of that contract, because of its power to make by-laws, and to prescribe the manner in which its general business should be conducted and its privileges exercised; all this under United States laws.

The Court say, in effect, the bank has no such rights. The duties of National bank officers are independent of the by-laws defining their powers, independent of the bank's contracts with them—all matters of pure tort depending solely upon (general) law, and under such law, as we apply it, the bank's President was not severally liable to you, the bank, as you claim. Your by-laws, your contract with him, did not make him so, or, to use the Court's own language, defining defendant's liability:

"Their failure to use due care was a wrong, a tort, pure and "simple," and the averments.

"That defendants promised faithfully to discharge their "trust with due care and attention," etc., are unnecessary, and do not affect "the cause of action." This is the decision. But the bank has a right to sue on this contract if it was made. Jones vs. Str. Cortez, 17 Cal., 487.

This and the by-laws were pleaded as the foundation of plaintiff's action, and the Court, having undertaken to end the litigation and end forever the bank's claim against its President, on account of the acts charged, necessarily by its judgment that the facts pleaded, proven and found show no several liability, denied the bank's claim to the right to make its President's liability other or different from that of a corporation without any by-laws on the subject, or without the

power given National banks by their charter, so to define the power given National banks by their charters, so to define the powers of its officers.

It can not be said that the decision in this cause rests on principles of general or local law, since the Court, to make those assumed principles applicable, had to reject the claim made by the plaintiff and the Bank under the Revised Statutes, that the President was liable severally as President.

This was the case on which the recovery was rested. The opinion of the Supreme Court admits this (top par., p. 44), but it goes on to say, this is not the case made by the pleadings. Had the Court seen fit to stop here and simply reverse the cause on this question of practice, it would have gone back for a new trial; this judgment would not have been final; no Federal question would have been presented. But it did not stop here. It went on to a final judgment in that Court, which, if it stands, puts an end, not simply to the liability of Thomas as Director, as member of the Executive Committee, but as President as well.

This brought the case within the jurisdiction of this Court, since it is clear that both the several and the joint obligation of the defendant Thomas are pleaded, specially set up and claimed, and the right to hold him severally asserted under Federal Statute, both in the complaint and in the findings of the trial Court, where the issue is simply narrowed by leaving out the joint case made against the three. The pleadings and the judgment may both be consulted to determine the existence of a Federal question. (Craig vs. Mo., 4 Pet., 410).

The Bank in the case at bar is not strictly *sui juris*, a receiver having been appointed. Case No. 674, October term, 1896, brings up another branch of the same cause by a separate writ of error, wherein the contest arising between the Bank and the receiver is continued by the agent claiming his election as successor to the receiver, under the Act of Congress, June 30th, 1876. That this suit is one within the saving clause of the Act of July 12th, 1882, perhaps more clearly appears from that record.

Not only does it appear to be a suit between the Bank and the receiver, but it may well be held to come within the other clause of the Statute which saves jurisdiction in suits to wind up the affairs of a National Bank. It is not a suit to forfeit the franchise—that to an insolvent corporation is of no value, perhaps. But it is a proceeding in equity in which the direc-

tors and officers, as trustees, are called upon to account for their breaches of trust. They are entitled to have all claims against them settled in this suit. (Hand vs. Bank, supra).

And while it does not, perhaps, involve the proper distribution of assets in the receiver's hands; the Court does possess power, under broad principles of equity, to proceed to a decree that shall settle all matters affecting the Bank, its officers, and stockholders, not committed to the exclusive jurisdiction of the Federal Courts.

Having funds in its hands for distribution, it has power to distribute these direct to the stockholders, where the facts warrant such proceeding, and for that purpose may appoint its own receiver to collect the judgment. Fox vs. Hale & Norcross Co., 108, Cal., 475. What power it has over the agent, claiming his election under the stockholders, will depend on the agent's character.

If it should be held that he, too, is an United States officer, then is the jurisdiction of the Federal Courts saved for two reasons—both because the suit is between the Bank and an officer or agent of the United States, and because it is to wind up the Bank's affairs within the meaning of the Act of July 12th, 1882. In such case the claim of the Bank that its cause of action is equitable, and that in this proceeding it is entitled to an immunity from such technical and strictly common law doctrines as those applied herein, are claims arising under the general power given the Bank to sue in equity, which, in such cases being denied the Bank in case at bar, this Court has jurisdiction of the writ of error.

Both branches of the suit are by the writs of error removed to this Court. (Ex parte Chetwood, No. 7, original vol. 17, Sup. Ct. Rep., 385).

The questions arising on that record affect mainly the administration of the fund paid into Court in the suit in the trial Court, and motions to dismiss are noticed in both for the same day.

We believe a Federal question appears in each record, that the State Courts will not be allowed to define—as they have sought here to do—the duties of the President of a National Bank, according to a standard other than that provided by the Statutes of the United States. That this Court has, and is, given jurisdiction for the purpose of preventing the total destruction of the power given National Banks in their charters to define and make clear the duties of its officers.

That that salutary power will not be taken from these Banks by the decision of this Court that it has no jurisdiction to review the judgment of the State Courts in this cause.

The President of this Bank was held on the trial responsible to it in a sum now amounting, principal and interest, to nearly $200,000.00.

After a protracted trial judgment is entered against him for what the Court considered his just share of the loss suffered by the Bank.

The Appellate Court, on the merest technicality—one rejected by this Court in an early ruling, never since challenged, (Minor vs. Mechanics' Bank, 1 Pet., 46-79)—adjudges him released.

But to apply that technical and obsolete principle of retraxit (I. Van Vleet Former Adjud., p. 173) it was first necessary to hold that the President, as such, was not and could not be under any several liability, despite the Bank's by-laws, its contract with its agent, and the Revised Statutes. In so doing the State Court invaded the domain of Federal law. Thereby it gave this Court power and jurisdiction to prevent what would otherwise remain a miscarriage of justice and misapplication of legal principles, without remedy.

We respectfully submit that the motion to dismiss, for want of jurisdiction, should be denied.

ROBERT RAE,
E. G. KNAPP,
Counsel for Plaintiffs in Error.

May 4th, 1897.

Brief of Rae & Knapp for P.E. on mo. allow

Filed May 18, 1897.

Supreme Court of the United States.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO and JOHN CHETWOOD, Jr., Plaintiffs in Error,

vs.

R. P. THOMAS, Defendant in Error.

(Cause No. 673, October Term, 1896.)

AND

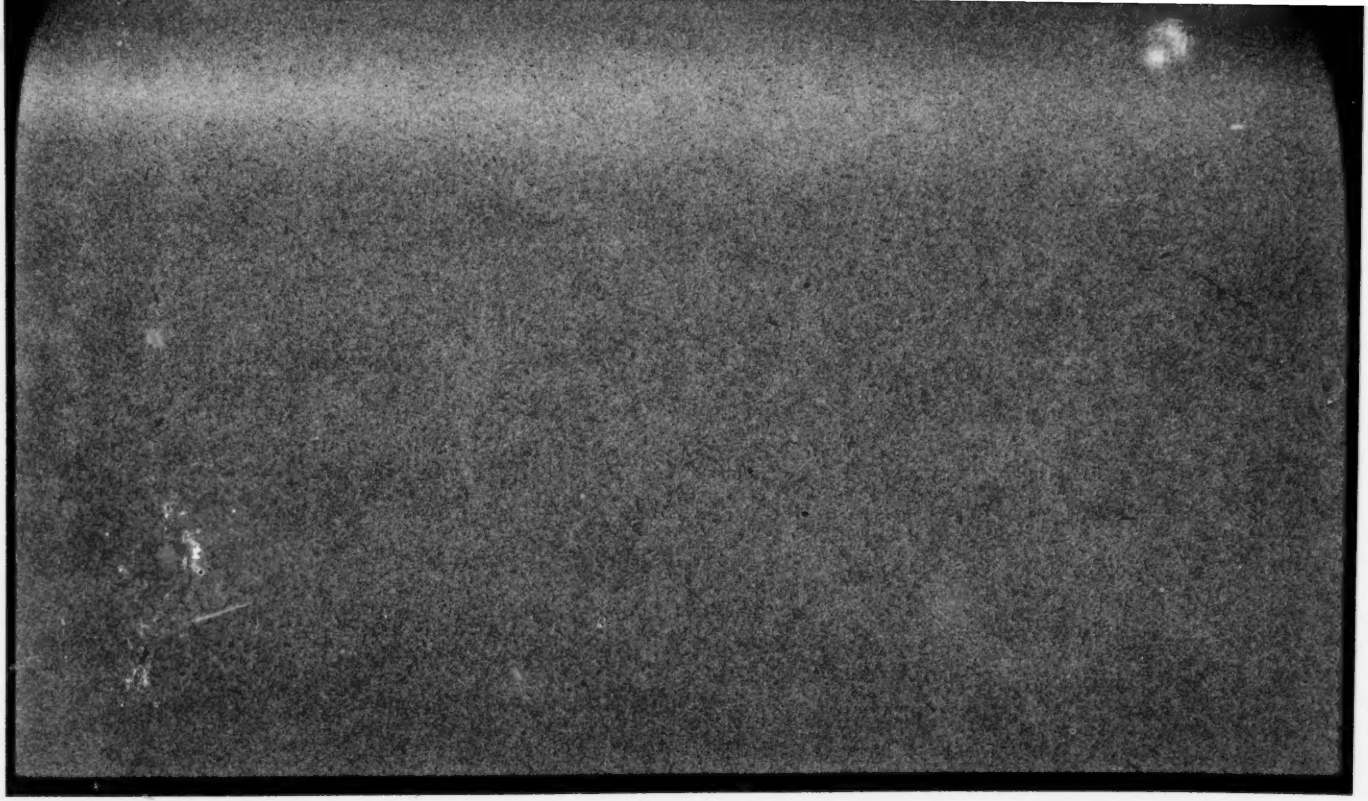
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, and JOHN CHETWOOD, Jr., Representative Stockholder therein, Plaintiffs in Error,

vs.

T. K. STATELER, S. P. YOUNG, and R. P. THOMAS, Defendants in Error.

(Cause No. 674, October Term, 1896.)
In Equity.

MOTION FOR AN ALLOWANCE TO PLAINTIFFS IN ERROR FROM FUNDS IN COURT, AND PAPERS SUBMITTED IN SUPPORT OF SAID MOTION.



Supreme Court of the United States.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, and JOHN CHETWOOD, JR., Plaintiffs in Error,

vs.

R. P. THOMAS, Defendant in Error.

(Cause No. 673, October Term, 1896.)

AND

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, and JOHN CHETWOOD, JR., Representative Stockholder therein, Plaintiffs in Error,

vs.

T. K. STATELER, S. P. YOUNG, and R. P. THOMAS, Defendants in Error.

(Cause No. 674, October Term, 1896.)

In Equity.

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vs.
T. K. STATELER, S. P. YOUNG, and R. P. THOMAS, Defendants in Error.
(Cause No. 674, October Term, 1896.)
In Equity.

MOTION FOR AN ALLOWANCE TO PLAINTIFFS IN ERROR FROM FUNDS IN COURT.

Come now the plaintiffs in error by their counsel appearing in that behalf, and renew the motions made by plaintiff in the Superior Court of California on September 25, 1896, and denied by that Court on March 19, 1897, as appears by the bill of exceptions hereto annexed and made part hereof and marked "Exhibit A," and move this Court to make an allowance out of the funds on deposit in bank to the credit of the action pending in said Superior Court to John Chetwood, Jr., by such orders as may be proper to pay costs, disbursements, expenditures and attorney and counsel fees on account of services rendered and to be rendered by said Chetwood and solicitors, attorneys and counsel employed by him in behalf of said banking corporation plaintiff in error
2 and the stockholders thereof, on the ground that plaintiff has incurred heavy costs and liabilities on behalf of said corporation and its stockholders in this litigation for their benefit, and the said corporation by its Board of Directors and Officers have authorized and approved the action of said plaintiff, and consent to the granting of said motion and that this is a proper case for such order and allowance by this Court; on the further ground that said motion was sanctioned by the Supreme Court of California by its decision herein on August 7th, 1896, and said motion was made in

said Superior Court of said State in and for the City and County of San Francisco on September 25th, 1896, but said Court was, by injunction of the Circuit Court of the United States, Ninth Circuit, Northern District of California, prevented from hearing said motion until March 19, 1897, when the said motion having been renewed was denied by said Superior Court because of the appeals taken to this Supreme Court by writs of error allowed and served, and said trial Court considered and ruled that the power to act herein and pass upon said motions rests with this Court; and plaintiffs in error show that all parties in any way interested in said funds desire the said motion granted, and have consented to and joined in the same, as will appear by the petition of said corporation and all stockholders interested in said funds verified by the officers thereof, hereto attached and made part hereof, and the indorsements and admissions of service and stipulations hereto appended indorsed thereon.

ROBERT RAE and
E. G. KNAPP,
Counsel for Plaintiffs in Error.

3 Supreme Court of the United States.

NOTICE OF SUBMISSION.

You will please take notice that the motions of which the foregoing are true copies, with the papers submitted in support thereof, will be made and submitted to the said Supreme Court at its Courtroom in the City of Washington at the opening of Court on Monday, the 17th day of May, 1897, or as soon thereafter as counsel may be heard. Annexed are the papers submitted in support of said motion, including a brief of the argument.

ROBERT RAE and
E. G. KNAPP,
Counsel for Plaintiffs in Error.

To R. P. Thomas, T. K. Stateler and their counsel; A. H. Ricketts, R. B. Mitchell, R. A. Friedrich, W M. Pierson, and to R. R. Thompson and R. A. Wilson.

4 Supreme Court of the United States.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO and JOHN CHETWOOD, JR., Plaintiffs in Error,
vs.
R. P. THOMAS and T. K. STATELER, Defendants in Error

PETITION OF THE CALIFORNIA NATIONAL BANK AND STOCKHOLDERS INTERESTED IN SAID FUNDS IN COURT.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Come now the plaintiffs in error, the California National Bank, of San Francisco, a corporation, and a National Bank, and John Chetwood, Jr., a stockholder, also a plaintiff in error, and other stockholders, owning in all 355 shares out of a total of 2,000 shares of the capital stock of said National Bank and said 355 shares being the only stock entitled to share in the distribution of the funds in Court in the cause, as will appear hereinafter, and respectfully petition payment to them of the funds in Court and for such order with reference to said funds and disposition thereof, as may be proper, and in that behalf aver and show as follows:

I.

That on the 15th day of December, 1888, the said
5 National Bank temporarily suspended business, and on the 14th day of January, 1889, the Comptroller of the Currency of the United States appointed S. P. Young a receiver to take charge of its affairs under the Act of Congress entitled "An Act Authorizing the Appointment of "Receivers of National Banks and for other purposes, "approved June 30th, 1876," and the other Acts of Congress under and by virtue of which the said corporation was incorporated and organized.

That at that time the stock of said corporation consisted of two thousand shares, of which the defendant in error, R. P. Thomas, owned and still owns 1,020 shares, the defendant, R. R. Thompson, owned and still owns 555 shares, and defendant, R. A. Wilson, owned and still owns 70 shares; and the remaining 355 shares were and are owned and evidenced by certificates therefor as follows:

6

No. of Cert.	Favor of.	No. of Shares.	Then and now owned by.
1	M. R. Morgan	50	M. R. Morgan
5	John Chetwood, Jr.	20	John Chetwood, Jr.
6	J. A. Drinkhouse	10	J. A. Drinkhouse
7	R. E. Raimond	10	Executors of said Raimond's will
9	Thos. McDonald	50	Thos. McDonald
10	Chas. Heintzen	25	Chas. Heintzen
18	W. K. Vanderslice	10	W. K. Vanderslice
23	Geo. E. Whitney	50	His widow, Mary L. Whitney
25	Geo. Niggle	100	Geo. Niggle
28	Chas. A. Parsons	10	Chas. H. Holt
41	A. B. Blakeslee	12	Wm. Noyes
42	E. W. Noyes	8	Wm. Noyes
		355	

II.

That on July 19th, 1890, plaintiff, John Chetwood, Jr., brought this action in equity in the Superior Court of California on behalf of himself and the remaining owners of said 355 shares of stock, and in the name of the said corporation against the said defendants, Thomas, Thompson and Wilson, owners of the remaining 1645 shares, and prosecuted said suit at his own cost and against the opposition of said receiver and without aid from him or said corporation till September 24th, 1894, on which date said defendant, R. R. Thompson, paid into said Court the sum of $20,000.00, and said R. A. Wilson paid in the sum of $7,500.00 on
7 account of the total loss caused by the acts and omissions of defendants as trustees of said National Bank, and, further, said Thompson and Wilson then and there agreed to and with said Chetwood that neither they, said R. R. Thompson nor said R. A. Wilson, nor their said 625 shares of stock in said National Bank should or would share or seek to share in the distribution of said fund of $27,500.00, or any part thereof, but that the same should belong and be paid to the remaining shareholders or to such of them as might be entitled to share therein, to wit, to the owners of said minority of 365 shares, in proportion to the number of shares owned by each, and as securtiy that said agreement should be kept, and they and their 625 shares of stock excluded from any

share in said fund; the certificates representing said 625 shares of stock were delivered over to and placed under the control of said plaintiff, John Chetwood, Jr., and said action was thereupon discontinued and dismissed as against said Thompson and Wilson, and plaintiff agreed that he would not prosecute the said action farther as against them.

III.

That said suit proceeded against said R. P. Thomas, defendant, and later, on November 20th, 1894, said Superior Court decided, ordered and adjudged that said payment of $27,500.00 was only a partial payment, and was not a satisfaction of the claims of said corporation and its stockholders against defendants, and was not a full payment, but was on account merely of the said total loss, and debt due from defendants for and by reason of their breaches of trust, and that
8 there remained and was still unpaid the sum of $139,-419, due as a debt caused by said losses, and by the acts and omissions of said R. P. Thomas, and still unpaid and due and owing from defendant, R. P. Thomas, to said corporation, said National Bank, and entered judgment for said sum, and unpaid balance of indebtedness $139,419.00 in favor of plaintiff, but for the use of said bank and against said remaining defendant, who had not accounted for his acts and had paid no portion of said indebtedness, to wit, against defendant in error, R. P. Thomas, which said judgment for $139,419.00 was recorded on November 21st, 1894, and thereupon plaintiff asked of said Court and received an allowance on account of costs incurred and paid by him, including counsel fees for services rendered up to that time amounting to $9,500.10.

IV.

That prior to said time, to wit, on the 18th day of January, 1890, the Comptroller of the Currency of the United States had levied an assessment of $75,000.00 upon the capital stock of said corporation, said national bank, and all the stockholders therein had paid the same in full except said Thomas, who had paid in only $22,895.73 of the total $38,250.00 due from him and levied upon and against his said 1,020 shares of stock, leaving $15,354.27 unpaid and delinquent; but notwithstand-

ing said delinquency the said Thomas had, on July 6th, 1894, claiming to act under authority of the Act of Congress entitled "An Act to amend an Act entitled 'An Act authoriz-
" 'ing the appointment of receivers of national banks, and for
" 'other purposes, approved June 30th, 1876,' approved
9 " August 3rd, 1892," caused one T. K. Stateler to be elected nominally and in form the agent of these stockholders of said corporation under said act of Congress, and at said meeting and election of July 16th, 1894, no shares of stock were voted for said Stateler, or at all, save the said 1,020 delinquent shares on which said assessment was on that day unpaid as aforesaid.

That said corporation has never been dissolved by decree of any Court, nor have two thirds of the capital stock, or the owners thereof, ever voted to dissolve the said bank.

But on February 26th, 1895, the said receiver, S. P. Young, and the said Comptroller of the Currency, in form, assigned to said T. K. Stateler all assets of said bank in their hands or under their control, and did deliver to him funds of said bank aggregating $10,000.00 and upwards, as petitioners are informed and believed, and other property of much greater value, being all the assets of said bank save and except the aforesaid judgment against said Thomas, and said funds so in Court as aforesaid.

V.

That said R. P. Thomas was in November and December, 1894, and ever since has been and still is, a wealthy man perfectly solvent and able to pay said judgment, but immediately upon the judgment being entered he concealed all his property and transferred the same to various parties without consideration and in secret trust for himself, and on or about December 10th 1894, filed in Court his voluntary petition in insolvency, and obtained an order thereon adjudging
10 him an insolvent debtor, and later, to wit, on July 17th, 1895, he appealed from the said judgment of November 20th, 1894, to the Supreme Court of California, and claimed, set up, and asserted in and on and by said appeal that by the said payment of said sum of $27,500.44 into Court and the dismissal of the said action as against his co-defendants he, said Thomas, was wholly freed and released from any and all claims of said corporation set up and asserted in said suit.

That at the same time, while so seeking both to evade and reverse said judgment, and while so claiming the benefit of the said payment so made by his co-defendants, said Thomas caused said T. K. Stateler to appear in this said action on March 19th, 1895, and to claim that the said funds so paid into Court were surplus funds of the said national bank, to be distributed under and by virtue of the aforesaid Act of Congress in repayment of the said assessment, so as aforesaid levied and paid, and to move said Court on that day that said funds be paid over to him, said T. K. Stateler, for that purpose, and said motion being denied on July 8th, 1895, said T. K. Stateler took an appeal on August 14th, 1895, from said order to the Supreme Court of said State.

VI.

That after said Thomas had so filed his petition to be declared an insolvent debtor, and on or about the day of February, A. D. 1895, said Superior Court allowed and paid said plaintiff the sum of $1,000.00 from said funds, to be used in protecting and enforcing the collection of said judgment against said Thomas and uncovering his property and subjecting the same to the said judgment for the benefit
11 of said bank and in preventing his escaping the same by the aforesaid measures, and required said plaintiff to account therefor, and thereafter plaintiff took active measures to protect and enforce and collect said judgment for the benefit of said bank and its stockholders in the Supreme Court of California, and in the said Court where the said insolvent matter was pending and in other Courts, and succeeded in uncovering and subjecting to the claims of said bank large amounts of property, real and personal, belonging to said Thomas, and having expended said money, filed his account thereof, and said T. K. Stateler, in the interest and at the instance of R. P. Thomas, opposed plaintiff's said efforts by every possible means in his power, and, furthermore, began and took various and sundry steps, actions, and proceedings for the purpose of aiding said Thomas in his efforts to get rid of said judgment without paying the same or any part thereof, and of preventing the enforcement of said judgment and harassing and oppressing this corporation and its officers and said plaintiff and those interested with him in their efforts to compel said Thomas

to account for his acts as President and trustee and to enforce his liability for breaches of said trust, and, amongst others, said Stateler took the following measures all with the intent aforesaid and at the instance and in the interest of said Thomas, to wit:

VII.

The said Stateler, claiming to be a creditor of said Thomas, and for purposes of delay merely, appealed, on the 18th day of March, 1895, from the order adjudging said Thomas
12 insolvent, which said order was affirmed when said appeal was heard.

On the 18th day of April, 1895, he sued out a writ of *certiorari* in the Supreme Court of California to annul an order made in said insolvency proceedings subjecting the homestead of said Thomas to the claims of said bank and to said judgment, which said order was granted because of the pendency of the appeal last aforesaid.

On or about the 15th day of December, 1895, he filed a petition for a writ of *certiorari* to annul the orders making aforesaid allowance to plaintiff, and later brought an action against plaintiff in the United States Circuit Court, Ninth Circuit, for the said allowance of $9,000.00, and on January 4th, 1895, filed his bill in the said Circuit Court, Northern District of California, against said Chetwood and said bank, its directors, officers, and stockholders to prevent any action by said corporation or its officers, as such or at all, and therein, on February 4th, 1896, obtained an injunction and restraining order in words and figures as follows:

13 " In the Circuit Court of the United States, Ninth Cir-
" cuit, Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a National Bank, and JOHN CHETWOOD, JR., Defendants.

" An order having been heretofore duly given and made
" in the above-entitled action requiring the defendants to be
" and appear before this Court at a day and hour herein speci-
' 'fied and show cause, if any they have, why the said bank,

"its board of directors, officers, and employees, and the said "John Chetwood, Jr., his agents and servants, and each and "every of their said attorneys, solicitors, and counselors, "should not be restrained and enjoined pending the determi- "nation of this action from denying the rights of the com- "plainant to the said office of agent of said banking associa- "tion, and from denying his right as such agent to the "exclusive control of the assets of the said bank, and from "commencing any further litigation against him as such "agent, and from prosecuting and defending any such "actions theretofore brought by them or either of them
14 "against complainant as such agent touching his right "to such office and touching his exclusive right as such "agent to collect the assets of said bank, except the suit now "pending in this Court, brought by said defendants against "the complainant on the 12th day of November, 1895, and "which suit was by said order to show cause hereby exempted "from the operation of any injunction that might be there- "after granted in this action, and further, to show cause why "said bank, its board of directors, officers, and employees, "and the said Chetwood, his agents, and servants, and each "and every of their said counselors, attorneys, and solicitors, "should not be enjoined pending the determination of this "action from commencing any further suits to collect any "outstanding debts due said bank, whether the same be evi- "denced by an open account note, bill, or judgment, and par- "ticularly from attempting in any manner to collect the "judgment theretofore recovered against Richard P. Thomas, "for said bank, and from further prosecuting the suit brought "by defendants in the Superior Court of Alameda County to "place a receiver in charge of the Standard Soap Company; "and said order to show cause having been fully heard, "Messrs. Pierson & Mitchell appearing as solicitors for the "complainant and A. W. Thompson and John Chetwood, Jr., "as solicitors for the defendants, and thereafter submitted "to the Court for decision, and the Court being fully advised "in the premises—

"It is now ordered, adjudged and decreed that until the "further order of this Court, or of the Judge thereof, the "defendants, the California National Bank of San Francisco, "its directors, officers, and employees, and said John
15 "Chetwood, Jr., his agents, servants, attorneys, solicit- "ors, or any other representatives, are hereby re-

"strained and enjoined from commencing any further litiga-
"tion against the complainant, as agent of said bank, and
"from commencing any further suits to collect any outstand-
"ing debts due the bank, whether the same be evidenced by
"open accounts, bills, notes, or judgments, or otherwise, or
"from in any way whatever taking or attempting to take any
"control or possession of any of the funds or assets or prop-
"erty of the said bank, and from settling and allowing, or
"attempting to settle or allow, any attorney's charges or any
"other fees, expenses, or costs growing out of or which it
"may be claimed grew out of any past litigation in this
"matter, and from in any way disposing of or encumbering
"any of the assets, money, or property of said bank; but the
"defendants are not hereby enjoined from prosecuting or
"defending to final determination any actions in this matter
"now pending in the Supreme Court of the State of California
"or in this lower Court.

"Dated February 24, 1896.

"JAS. H. BEATTY, *Judge*."

16 VIII.

That the records in this cause on said two appeals to the Supreme Court of the said State having been filed therein, and the same having been submitted, the said Supreme Court of California, on July 22nd, 1896, decided and adjudged that the aforesaid dismissals and continuances of said action in equity as against said Thompson and Wilson were a retraxit and a renunciation of the action as against R. P. Thomas, and that said payment into Court by his co-defendants of said sum of $27,500.00 inured to the benefit of said R. P. Thomas and operated to release him, and reversed said judgment against said Thomas, made and entered November 20th and 21st, 1894, and ordered judgment entered in his favor, and later, on August 7th, 1896, said Supreme Court of California reversed the order of July 8th, 1895, denying said Stateler's motion to have said funds turned over to him, and on the ground that said litigation was at an end by virtue of its decision made July 22nd, 1896, ordered said funds delivered over to said Stateler after paying said Chetwood his costs and attorney's and counsel fees, and on September 1st, 1896, denied a petition to rehear the said last mentioned appeal before the said Court in Bank, and said decision of August 7th, 1896,

then became final in that Court; but thereafter, and within sixty days, writs of error duly issued to review in this Supreme Court of the United States the said decisions of said Supreme Court of California, which said writs have been returned to this Court and filed and docketed as the above entitled causes No. 673 and 674, October term, 1896; and the said funds having been theretofore, to wit, on September 10th, 1895, deposited in banks, bearing interest, in the following amounts: $7,639.84 in the San Francisco Savings
17 Union, $5,000.00 in the German Savings Bank, $4,000.00 in the Hibernia Savings Bank, it was ordered, on or about October 22d and 23d, 1896, that the bonds on said writs of error be approved as *supersedeas* bonds in said cause.

IX.

That prior to the taking of the said appeals to this Supreme Court of the United States by said two writs of error, to wit, on September 25th, 1896, said plaintiff, John Chetwood, Jr., moved said Superior Court that an allowance be made him for his costs and fees pursuant to the decision last aforesaid, but said application was not heard until after the allowance and service of said writs of error and the creation of said *supersedeas*, because the hearing thereof was delayed and prevented by reason of the existence of the aforesaid injunction and of contempt proceedings taken thereon in said Circuit Court of the United States at the instance of said Thomas by said Stateler, as appears by the annexed Bill of Exceptions.

That said injunction, as interpreted by the Judge of the said Circuit Court, also prevented and prohibited this corporation, plaintiff in error, and its stockholders from making any application to said Superior Court for the payment to them of said funds after the date thereof, upon the grounds herein set out or upon any ground, and permission to make any such application was refused by said Circuit Court and denied to petitioner; and thereafter, on November 19th, 1896, said Stateler sought to prevent by means of said injunction this corporation from having the said writs of error heard by this Court, and at the instance of said Thomas
18 moved said Circuit Court, in the action in which said injunction was issued, for an order commanding the plaintiffs in error to cease the prosecution of said writs of

error in the name of said bank in this Court and to dismiss said second writ, which order was on that day made, and obliged plaintiff herein to obtain the extraordinary writ of *certiorari* from this Court to procure a reversal of said order and cause the same to be vacated and set aside, which writ of *certiorari* was allowed and granted by this Court February 15th, 1897.

X.

That on said November 19th, 1896, plaintiff and his counsel were convicted of contempt by said Circuit Court for action taken in said matter, and said orders adjudging them guilty of contempt remained in force until set aside, as above recited, by order of this Court in *Ex parte* Chetwood, No. 7, Original, October Term, 1896, decided February 15th, 1897, and plaintiff and his counsel were unable to renew said motion for costs and counsel fees until March 19th, 1897, when the said motion of plaintiff for allowance, being renewed, coming on regularly to be heard, it was then and there denied by said Superior Court, and denied, as appears by said said Bill of Exceptions, solely upon the ground of want of power to hear the same because of said writs of error, citations thereon, bonds and *supersedeas* created thereby; and further, said Court refused to allow plaintiff costs of the proceedings in this Court for the reason that said proceedings and writs of error are, in the opinion of the Judge of said Superior Court, now presiding in Department 3, where said suit in equity is pending, ill-advised, and the said decisions herein made by the Supreme Court of the State of Cali-
19 fornia, in the opinion of said Honorable Judge of said Superior Court should and would be affirmed by this Court, as more fully appears from the annexed Bill of Exceptions hereinbefore referred to and made part hereof and marked "Exhibit A."

XI.

Said petitioners therefore further, in this behalf, aver that on the 26th day of September, 1895, at a regular meeting of the board of directors of said national bank, the President, W. K. Vanderslice, was by resolution authorized and directed to take such action as he saw fit in this litigation, and

the said President and the Vice-President, C. H. Holt, have both sanctioned and approved all the foregoing acts of said John Chetwood, Jr., and particularly the suing out of said two writs of error, and have on behalf of said corporation employed said Chetwood and his solicitor, E. G. Knapp, and counsel Robert Rae. Esq., to represent said corporation in this Court, but all the assets of said corporation being in the hands of said Stateler, said corporation has been and is unable to pay any costs or fees to its said attorneys and counsel until this Court make allowance to plaintiffs in error for that purpose.

XII.

Petitioners further aver that the said owners of said minority of 355 shares of the capital stock of said bank are the only persons interested in the funds now in the hands of the Court to the credit of this cause, as aforesaid, and that whether the said Thomas was or was not released by the said payment into Court and dismissal of his co-defendants, the said Thomas ought not to have or receive any part or share in the distribution of said funds, since the said dismissal of his co-defendants, made upon receipt and in consideration of the payment of said $27,000.00, was coupled with the aforesaid agreement that the said parties so released should not share as stockholders in the distribution of said funds, by which all parties then and thereby released are in equity bound; and further, that if said Thomas was not released thereby, then is said litigation not at an end, and said funds are applicable to payment of the costs of this litigation first, and thereafter to the payment of the claims of said corporation and of said minority against said Thomas for said losses caused by breaches of his trust as an officer of said bank, evidence by said judgment recorded against him as aforesaid. That said Stateler has no power as agent of said bank or of the stockholders to distribute said funds in accordance with said agreement or the rules and principles of Courts of Equity, but must follow the statutes under which he claims his election, which gives him custody of no funds save those that belong to all stockholders alike and requires him to distribute such surplus funds in a certain way only, to wit, in "repaying any amount or amounts which have been "paid by any shareholder or shareholders of such association

"upon and by reason of any or all assessments made upon "the stock of such association by the order of the Comptroller "of the Currency in accordance with the provisions of the "statutes of the United States"; and that the distribution under said statute of the funds on deposit in this cause would give a large part of the said funds in Court in this cause to said Thomas, contrary to said agreement and contrary to the rules and principles of Courts of Equity, and in disregard and violation of the rights of petitioners therein.

21 XIII.

Petitioners further aver that said national bank, by act of its directors and the owners of all of said 355 shares of stock have each and all sanctioned and approved all the acts of said Chetwood aforesaid and all his proceedings, and the owners of 280 of said shares have, for the purpose of aiding this plaintiff in prosecuting said litigation, assigned and delivered the said 280 shares and the certificates representing the same to B. Noyes, the Secretary of said bank, and given him power and authority to take such action as he deem best, and to apply to paying costs of said litigation such portion of the said funds as he deem necessary, and the said B. Noyes, Secretary of said corporation, and holding said 280 shares as assignee and trustee of said owners for the purposes of this litigation, joins in this petition, and in that behalf avers that it is in his opinion necessary to the proper conduct and prosecution of this litigation against said Thomas and said Stateler and for the protection of the rights of said owners of said 355 shares of stock that said funds on deposit in this cause be placed at the disposal of this corporation, and that said plaintiff, John Chetwood, Jr., be authorized to draw therefrom such sums, from time to time, as are required to pay his costs as the agent and attorney and representative of said national bank and of said holders of said 355 shares of stock in this litigation, and particularly costs and counsel fees in this Court on aforesaid writs of error in defense of the action of the trial Court and its jurisdiction and power over the said fund and the right of the said corporation and of the said owners of said 355 shares in and to the same and to the whole thereof.

That the facts hereinbefore recited, showing said minority owners of 355 shares to be the only shareholders interested

in said funds, appear in the record and returns to said writs of error.

Wherefore, petitioners pray that the bank books representing said sums of $5,000.00, $4,000.00 and $7,689.34 be delivered to said plaintiff, John Chetwood, Jr., as the chosen
22 agent of this corporation in this litigation and of its said stockholders, and that said plaintiff be authorized to draw from the funds in said savings banks such sums as the officers, to wit, the directors, President and Secretary of this corporation, deem proper and necessary for the prosecution of this litigation solely, and abide the further order of this Court as to the disposition of the balance of said money, and for such other and further order as to the Court may seem meet and agreeable to equity.

E. G. KNAPP,
Solicitor and Attorney,
and
ROBERT RAE,
Counsel for said Petitioners.

23 We hereby admit service of the foregoing petition.
MASTICK, BELCHER & MASTICK,
Attorneys for R. A. Wilson,
Formerly a Defendant herein.

24

State of California,
City and County of San Francisco, ss:—

W. K. Vanderslice and Bartholomew Noyes, being duly sworn, deposes and says, each for himself and not one for the other, that said W. K. Vanderslice is the President and B. Noyes is the Secretary of the said California National Bank of San Francisco, plaintiffs in error in the above entitled action; that he has read the foregoing petition to the Supreme Court of the United States, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

W. K. VANDERSLICE.
BARTHOLOMEW NOYES.

Subscribed and sworn to before me, this 12th day of April, 1897.

N. E. W. SMITH,
[Seal.] *Notary Public in and for said City and County of San Francisco.*

EXHIBIT "A."

BILL OF EXCEPTIONS.

25 Be it remembered that on Friday, March 19th, 1897, in the Superior Court of the State of California, in the case of

JOHN CHETWOOD, JR., Plaintiff,
vs.
THE CALIFORNIA NATIONAL BANK, and R. P. THOMAS et al., Defendants.
T. K. STATELER (Intervenor)
} No. 30,052. Dept. 3.

in open Court—present.

Hon. Geo. H. Bahrs, Judge, and officers of the Court, counsel appearing as follows: For plaintiff, E. G. Knapp; for T. K. Stateler, Pierson & Mitchell and R. A. Friedrich, Esq., and for R. P. Thomas. Pierson & Mitchell; and the following proceedings were had:

Plaintiff read the following notice of motion, which, though noticed for March 12th, had been regularly continued till this day:

In the Superior Court of the State of California, in and for the City and County of San Francisco.

26

JOHN CHETWOOD, JR., Plaintiff,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FNANCISCO et al., Defendants.
} No. Dept. 3.

To R. P. Thomas and T. K. Stateler, and their attorneys herein:

Take notice that on Friday, March 12th, 1897, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, we shall renew the motion, notice of which heretofore served on you was entitled in this cause and read as follows:

"To T. K. Stateler, claiming to be the agent of the stock-
"holders of defendant bank, and Pierson & Mitchell and
"R. A. Friedrich, his attorneys.

"You will please take notice that on Friday, the 25th day
"of September, 1896, at ten o'clock a. m., or as soon thereafter
"as the matter may be heard, John Chetwood, Jr., will move
"this Court, in Department Three thereof, to make an allow-
"ance, out of the funds on deposit in said Court to the credit
"of the above entitled action, to said John Chetwood, Jr.,
"for his costs, disbursements, expenditures, and for attorney
"and counsel fees on account of services rendered and to be
"rendered by said Chetwood and attorneys employed
27 "by him in behalf of defendant banking corporation
"and the stockholders thereof.

"This motion will be made upon the records and papers on
"on file in this action and upon such oral testimony as may
"be introduced upon the hearing of this motion, and upon
"the grounds that said motion is a fit and proper one and
"that the time is now meet and ripe for the same.

"THOMPSON & THOMPSON,
"REDDY, CAMPBELL & METSON,
"E. G. KNAPP,
"*Attorneys for Plaintiff.*

"September 19th, 1896."

And on said day, or later, as aforesaid, plaintiff will, at the courtroom of said Superior Court, Department 3, in the New City Hall, in this city and county, move said Court for such allowance and payment to him out of the funds on deposit to the credit of this cause, and subject to the order of said Superior Court.

This motion will be based on this notice, the records and files of this Court and such evidence, oral or written, as may be given at the hearing, and will be made on the grounds stated above and the further grounds:

I.

That plaintiff was, until February 15th, 1897, by the injunction and orders of the Honorable Circuit Court of the United States, issued at the instance of said Stateler, prevented from making said motion in this cause, or at all.

28 II.

That on November 19th, 1896, plaintiff and his counsel, E. G. Knapp, were, on motion of Messrs. Mitchell, Pierson & Friedrich, on behalf of said Stateler, adjudged guilty of contempt by said Circuit Court for noticing said motion and for other steps taken in this cause, and thereby put to great pains, labor and expense.

That by reason of said orders of said Circuit Court plaintiff and his said counsel were obliged to and did apply to the Honorable Supreme Court of the United States for a rule to show cause why said orders should not be annulled and said Circuit Court prohibited from proceeding in said matter.

That on December 7th, 1896, such rule issued, returnable January 4th, 1897, and thereafter, on January 11th, 1897, return having been made, said cause was submitted, and on February 15th, 1897, the Honorable Supreme Court of the United States decided that said Circuit Court had no power to interfere with the Courts of this State in this litigation, and made said rule absolute and awarded on petition of plaintiff herein the extraordinary writ of *certiorari* to annul said orders of November 19th, 1896.

III.

That the claims of said Stateler to the right to control this litigation in the interest of R. P. Thomas have put plaintiff and his counsel to enormous costs and labor in necessarily bringing and defending numerous proceedings in this and other Superior Courts and the Supreme Court of the State and the Circuit and Supreme Court of the United States, and

29 in the said Court last named there are now pending on writs of error two causes, Nos. 673 and 674, in which are at issue respectively the following questions:

In case No. 673 the question at issue is the liability in equity of defendant R. P. Thomas to said defendant bank for the various breaches of his trust as President thereof, and the question of his right to claim that the dismissal entered in this cause as against his co-defendants was a release of his said liability.

In case No. 674, amongst others the questions at issue are the right and power of this Court, sitting as a Court of Equity, to retain said funds until the end of this litigation,

and to administer upon the same, if necessary, in accordance with the principles and rules of equity and the law of the land.

IV.

That despite said injunction and contempt proceedings in said Circuit Court to prevent, plaintiff has docketed said writs of error to review the decisions of the Supreme Court of this State in this case in the Supreme Court of the United States, and he is advised by his counsel, Robert Rae, Esq., who lives in Chicago, Illinois, and E. G. Knapp, who resides in San Francisco, Cal., and verily believes that he will make said pleas good, and he has given security to that end and incurred a liability for heavy costs and fees in said matters.

V.

That the aforesaid proceedings are all in the interest of said corporation and its stockholders in an effort to enforce the liability of said Thomas, and in defense of said fund and the power and jurisdiction of this Court over the same and its right to hear and determine questions affecting the distribution thereof.

30 VI.

And by reason of the existence of the foregoing facts the allowance to plaintiff of funds to pay costs and fees at this time is necessary and altogether proper.

The aforesaid motion will be and is hereby renewed without prejudice to said writs of error and the questions arising thereon, and the right to have the said writs of error heard and disposed of, and the plaintiff does not waive but insists upon the right to have the said matters heard and determined by the said Honorable Supreme Court of the United States, and makes this motion now in this Court in accordance with what he is advised are the requirements of the rules and practice of said Supreme Court.

E. G. KNAPP,
Attorney for Plaintiff.
REDDY, CAMPBELL & METSON,
Of Counsel.

Dated March 9th, 1897.

Good cause appearing therefor, it is hereby ordered that the time for serving this notice be and it is shortened to two days.

GEO. H. BAHRS, *Judge.*

Service admitted 10th day of March, 1897, on R. P. Thomas and T. K. Stateler, by their attorneys.

31 Plaintiff read also the following receipt:

"San Francisco, California, Sept. 18, 1895.

Received of John Chetwood, Jr., and R. B. Mitchell, representing T. K. Stateler, in pursuance of the order of the Court of September 6th, 1895, in the case of John Chetwood, Jr., vs. The California National Bank of San Francisco et al., No. 30,052, Department No. 3, three pass-books, as follows, to wit:

First: The San Francisco Savings Union, ordinary deposit pass-books, issued in the name of "Superior Court, San Francisco, Dept. 3, in the case of John Chetwood, Jr., vs. The California National Bank of San Francisco et al., showing a deposit dated September 10th, 1895, for $7,639.84.

Second: The German Savings and Loan Society, ordinary deposit pass-book, in the same name, showing a deposit on the same date of $5,000.00.

Third: The Hibernia Savings and Loan Society, ordinary deposit pass-book, issued in the same name, showing a deposit on the same date of $4,000.00.

Said pass-books to be retained by me and my successor until the determination of the appeal of T. K. Stateler from the order made in the above entitled action on the 8th day of July, 1895, now pending in the Supreme Court of this State, and until the further order of the Court.

C. F. CURRY, *Clerk.*

By GEO. W. LEE, *Deputy Clerk.*

And thereupon plaintiff asked that said motion be granted, and that a portion of said funds be ordered paid to plaintiff to meet costs of the proceedings had and necessary counsel fees incurred by plaintiff in said litigation referred to in said notice.

32 Mr. R. B. Mitchell, in opposition read the following affidavit:

"In the Superior Court of the City and County of San Francisco, State of California.

No. 30,052. Dept. 3.

JOHN CHETWOOD, JR., Plaintiff,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a corporation) et al., Defendants.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss.*

R. B. Mitchell, being duly sworn, deposes and says: That he is a member of the firm of Pierson & Mitchell, associated with Robert A. Friedrich, as the attorneys for T. K. Stateler, the duly elected, qualified and acting agent of the California National Bank of San Francisco, defendant herein; that on the 19th day of March, 1895, the said T. K. Stateler appeared in this action and moved to have certain moneys paid into this Court by the defendants, Robert R. Thompson and Robert A. Wilson, turned over to him, to be by him divided among the shareholders of The California National Bank of San Francisco, as provided by the statutes of the United States; that this motion was opposed by the plaintiff, John Chetwood, Jr., who claimed that he was entitled to receive this fund and use the same as attorneys' fees and Court costs incurred and to be incurred by him in this action, and in such
33 other actions as he might deem it necessary to institute to collect a judgment recovered by him in this action for the benefit of the bank against the defendant, Richard P. Thomas; that on July 8th, 1895, an order was made herein denying the motion of the said Stateler to have said fund turned over to him; that on the 14th day of August, 1895, the said Stateler appealed to the Supreme Court of the State of California from said order of July 8th, 1895; that on the 7th day of August, 1896, said order was reversed by the Supreme Court of the State of California, and this Court was directed to turn over to the said Stateler said fund, after making the plaintiff, Chetwood, a reasonable allowance for his costs, disbursements and attorney's fees in this action, as contemplated by law; that the said Chetwood had already been allowed by this Court out of said fund, which originally amounted to $27,500, the sum of $10,560.16 for attorney's fees and costs in

and connected with this action, and that the Supreme Court did not know of any allowance having been made to Chetwood for attorney's fees and costs at the time it rendered its decision, for the reason that no such allowance appeared in the record on the said Stateler's appeal; that on the 1st day of September, 1896, the plaintiff, Chetwood, filed in the Supreme Court of the State of California a petition for rehearing, and that, on the 4th day of September, 1896, the Supreme Court made its judgment and order denying a rehearing, and on the 5th day of September, 1896, the remittitur issued from the Supreme Court of the State of California to this Court and was filed herein on the 8th day of September, 1896; that on the 14th day of October, 1896, this Court duly made and rendered its judgment in favor of the said T. K. Stateler and against the plaintff, John Chetwood, Jr., for $150.00 costs.

34 Affiant further says that of the $10,560.16, so as aforesaid received by the said Chetwood for attorney's fees and costs in and connected with this action, $1,000 was delivered to him to expend in employing counsel and detectives, and paying the costs of such suits as might be necessary to collect the judgment recovered for the benefit of this corporation from the said Thomas, and he was required to account to this Court for his expenditures; that on the 22d day of July, 1896, the Supreme Court of the State of California, on the appeal from said judgment of Richard P. Thomas, reversed the judgment and ordered a judgment entered in favor of said Thomas against the plaintiff, Chetwood; that the remittitur on said judgment issued to this Court out of the Supreme Court of the State of California on August 22, 1896, was filed herein on August 28, 1896, and on the same day a judgment was entered by this Court in favor of Thomas and against Chetwood for $122.40 costs, and that said judgment is still unsatisfied or discharged; that on the 19th day of September, 1896, the plaintiff, Chetwood, appeared in this action and moved for an order making him a further allowance out of the fund for attorney's fees and costs; that this motion was opposed by the said Stateler; that on October 3, 1896, the said Stateler served and filed in this action a notice of motion for an order compelling Chetwood to account for the $1,000 entrusted to him as aforesaid; that both of these motions came up before this Court for hearing after various continuances on the 23d day of October, 1896, whereupon, the

attorney for the plaintiff stated in open Court that a
35 writ of error had been allowed by the Chief Justice of the State of California to the Supreme Court of the United States to review the action of the Supreme Court of the State of California in ordering this fund turned over to Stateler; and thereupon claimed that said writ of error operated as a supersedeas and that no further proceedings could be had in reference to said fund until the Superior Court of the United States had disposed of said writ of error; that this Court, Hon. D. J. Murphy, Judge, thereupon ruled that said writ of error operated as a supersedeas, and he thereupon refused to turn over said fund, or any part thereof, to said Stateler, holding that this Court had no power to make any further orders in connection with said fund, as the matter, by virtue of said writ of error, was solely before the Supreme Court of the United States.

Affiant further says that on the 31st day of October, 1896, there was lodged in the Clerk's office of the Supreme Court of the State of California, where the record of the action of said Court on the said Stateler's appeal then remained, and within sixty days, Sundays inclusive, after gendering of the judgment complained of, a copy of the writ of error so as aforesaid allowed to review said action of said Supreme Court on Stateler's appeal, and at the same time the undertaking required by law on the hearing of the citation; that said writ of error is now pending before the Supreme Court of the United States and undisposed of, and that said undertaking is still on file in the Clerk's office of the Supreme Court of the State of California, and that, as affiant is informed and
36 believes, said writ of error is a supersedeas; that all matters sought to be reviewed therein are now before the Supreme Court of the United States, and are no longer within the jurisdiction of the Superior Court of the City and County of San Francisco, and that the matter sought to be reviewed by said writ of error is the disposition of the fund in this Court to the credit of this action, and the whole thereof.

R. B. MITCHELL.

Subscribed and sworn to before me this 11th day of March, 1897.

EUGENE W. LEVY,

[Seal.] *Notary Public in and for the City and County of San Francisco, State of California.*

37 In reply to which the plaintiff read the following affidavit:

In the Superior Court of the City and County of San Francisco, State of California.

JOHN CHETWOOD, JR., Plaintiff,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO et al., Defendants.
No. 30052. Dept. 3.

STATE OF CALIFORNIA,
City and County of San Francisco, ss.

John Chetwood, Jr., being first duly sworn, states that he is the plaintiff herein.

That he has read the notice of motion for costs and fees filed herein March 10th, 1897, and this day read in Court, renewing the motion for an allowance out of funds in Court made herein on or about September 25th, 1896, and knows the contents thereof and the facts therein stated as the grounds of said motion.

That the same are all true of this deponent's own knowledge, save as to those facts therein stated, as on his information, or on advice and belief, and as to those he believes it to be true.

38 That replying to the affidavit of R. B. Mitchell, this day read in opposition to said motion, deponent says:

That the Supreme Court of this State, on and prior to August 7th, 1896, and before directing an allowance of costs and fees to plaintiff, did know of the orders made herein, allowing him a portion of the funds to pay his costs and counsel fees herein, not only from the briefs printed and filed by said R. B. Mitchell on said appeal and from the order of July 8th, 1895, refusing to turn the balance of said money over to T. K. Stateler, but also from the petition for writ of review filed by said counsel R. B. Mitchell, Esq., in said Supreme Court, seeking to review and annul the orders making such allowance, which petition had been denied prior to August 7th, 1895.

That on October 3d, 1896, deponent filed in this Court his sworn account of the use made of said $1,000.00 under the orders of this Court, which is still on file.

That on that day said Stateler's motion to have the funds in Court turned over to him was denied because of the writs of error and supersedeas bond thereon, but the said motion for allowance was not heard nor decided nor ruled upon, but was temporarily withdrawn by deponent solely because of the contempt proceedings then pending against deponent in the United States Circuit Court growing out of said
39 motion and the writs of error herein.

That of the $10,650.00 allowed and paid to deponent, $9,560.00 was expressly allowed by this Court for costs already incurred and paid and services rendered between July, 1890, and October, 1894, by deponent's counsel in this cause on account and because of two long and hardly fought trials of this cause, and various depositions and references in connection therewith which had resulted in a recovery and payment into Court of $27,500.00 and a judgment for $139,000.00 against R. P. Thomas in favor of the corporation defendant, and, furthermore, an agreement by the defendants, who paid the $27,500.00 that they would not participate as stockholders either in said $27,500.00 nor in the surplus funds of the bank in the hands of the receiver, nor in the first ten thousand dollars that might be thereafter recovered from the other defendant, R. P. Thomas, and thereby the interest of the bank stockholders who were entitled to share in said funds was greatly increased. And said agreement under the decision of the Supreme Court of California in reversing the judgment against Thomas, as plaintiff is informed and believes, should equitably prevent Thomas from sharing as a stockholder in said funds and thereby still further increase the interest of the stockholders entitled thereto.

That in addition to the $9,560.00 allowed as aforesaid by the honorable predecessor of this Court for costs and attorney's fees on account of services rendered between 1890 and 1894, the sum of one thousand dollars was by the late Honorable Judge of this Court placed at the disposition of plaintiff for the purpose of collecting the judgment against Thomas early in the year 1895 and more than two years ago.
40 That most of the said thousand dollars has been expended in actual and necessary costs and disbursements, and the remainder of said sum has been paid out in attorney's fees. That since the 19th day of March, 1895, it has been impossible for plaintiff to secure further allowance from this Court for any purpose whatever owing to the determined opposition of the said alleged Agent Stateler.

That plaintiff has since the said 19th day of March, 1895, been engaged in attempting to collect or protect the judgment of this Court opposed in a multitude of State and Federal Court proceedings and suits to do so by said Stateler. That so numerous and expensive have been the said suits and proceedings that plaintiff has, in addition to said thousand dollars, allowed by this Court, been compelled to advance about one thousand dollars for costs and expenses and actual disbursements alone, and has also incurred heavy liabilities to various counsel, and it is absolutely imperative for the protection of the trust herein that plaintiff be allowed a sum adequate to properly protect said trust and to properly and effectually maintain and prosecute the writs of error heretofore referred to and now pending before the Supreme Court of the United States.

That after the reversal of the judgment against Thomas by the Supreme Court of this State and the institution of said contempt proceedings against deponent and his counsel, deponent's counsel, A. W. Thompson, who had up to that time done most of the work in all this litigation, declined to act longer as counsel or attorney for deponent herein, and ceased and declined to take any further steps in this
41 matter or any part in deponent's effort to have the decisions of the Supreme Court of this State herein reviewed in the Supreme Court of the United States.

That deponent thereupon employed E. G. Knapp and Robert Rae, Esqs., to sue out and prosecute said writs of error, but he has not been able to and has not paid and is unable to pay his said counsel lately so employed any fees for their services in the said litigation or at all; and further deponent sayeth not.

JOHN CHETWOOD, JR.

Subscribed and sworn to before me this 19th day of March, 1897.

JUSTIN GATES,

[Seal.] *Notary Public in and for the City and County of San Francisco, State of California.*

42 And plaintiff thereupon moved the Court that one of the said three funds on deposit in bank to the credit of this cause be ordered placed at the disposal of the plaintiff for the purpose of enabling him to maintain and prosecute in

the Supreme Court of the United States the two writs of error referred to in the foregoing papers, numbered in said Court 673 and 674, and for the purpose of enforcing the liability of R. P. Thomas to account to said banking corporation for his breaches of trust as President, Director and member of the Executive Committee; and for the purpose of enabling him to defend the power and jurisdiction of this Court as a Court of Equity over the funds in Court recovered by the efforts of plaintiff, and preventing misappropriation or misapplication of the funds in the hands or that may come into the hands of said alleged agent, T. K. Stateler.

And plaintiff stated that he was willing to be placed under bonds in double the amount of any funds placed at his disposal to use the same in no other way than in meeting the necessary costs and expenses of such litigation. And plaintiff further stated that if such allowance be made he would not at the present time make any application for fees of his attorneys on account of services rendered since the allowance made him in October, 1894, and would only ask the allowance of such necessary expenditures as he has made.

43 The matter having been argued and submitted, the Court ruled and decided that by reason of the said writs of error, citations and bond given for costs and damages, and resulting supersedeas, that this Court had and has no power pending the decision on said writs of error to make the orders asked or any order making any allowance to plaintiff or his counsel for services hertofore rendered or costs paid or incurred.

That as to the allowance asked for the purpose of continuing the litigation, the Court was of the opinion that the suing out of said writs of error and the proceedings thereon in Supreme Court of the United States are ill advised; that the decisions of the Supreme Court of this State in this cause, reversing the judgments of his predecessors are right, and that they should be and would be affirmed by the Supreme Court of the United States.

That therefore an allowance to pay costs and fees of counsel in said Court on said writs of error would not be in defense of said fund, but would be consuming said fund, and on these grounds and for these reasons the said motions of plaintiff were and are denied.

To which rulings and decisions plaintiff then and there duly excepted, and the Court allowed the same, and hereby settles,

allows and certifies to the foregoing as a true Bill and State ment of all matters occurring at the hearing of said motion.

GEO. H. BAHRS, *Judge.*

March 26th, 1897.

The foregoing Bill of Exceptions is hereby agreed to, Marc 25th, 1897.

PIERSON & MITCHELL, and
ROBERT A. FRIEDRICH,
Attorneys for T. K. Stateler.

44 Endorsed: Filed April 10, 1897.
C. F. CURRY, *Clerk.*

. . . . . .

I, C. F. Curry, County Clerk of the City and County of Sa Francisco, State of California, and ex-officio Clerk of the Sup rior Court, in and for said city and county, hereby certify th foregoing to be a full, true and correct copy of the origin Bill of Exceptions in the above entitled cause, filed in m office on the 9th day of April, A. D. 1897.

Attest my hand and seal of said Court, this 10th day April, A. D. 1897.

C. F. CURRY, *Clerk.*
By P. W. LANNON, *Deputy Clerk.*

45 In the Superior Court of the City and County of S Francisco, State of California.

March 19th, 1897.
Present: Hon George H. Bahrs, *Judge.*

No. 30,052. Dept. 3.

JOHN CHETWOOD, JR., Plaintiff,
vs.
THE CALIFORNIA NATIONAL BANK et al., Defendants.

In this action the motion of the plaintiff for an order of t Court to make an allowance out of the funds on deposit said Court to the credit of the above entitled action for

costs, disbursements, expenditures, and for attorney and counsel fees on account of services rendered and to be rendered, came on regularly this day to be heard, Messrs. Reddy, Campbell & Metson and E. G. Knapp appeared as counsel for the plaintiff, and Messrs. Freidrich and Pierson and Mitchell for defendant, T. K. Stateler.

Thereupon the affidavit of opposing counsel was filed and read. Thereupon, after argument by respective counsel herein, and the Court being fully informed, it is ordered by the Court that said motion be and the same is hereby denied. It is further ordered that plaintiff be allowed to file an affidavit as of this day.

I hereby certify the foregoing to be a full, true and correct copy of an order made, and entered on the minutes of said Superior Court in the above-entitled Cause, on the 19th day of April, 1897, and now remaining of record in my office.

Attest, my hand and the seal of said Superior Court, this 15th day of April, 1897.

C. F. CURRY, *Clerk.*

[Seal.] By MORGAN BACKUS, *Deputy Clerk.*

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46 BRIEF OF ARGUMENT.

In this Cause, the Supreme Court of California, in its final order, made August 7th, 1896, ordering the funds in Court paid to T. K. Stateler on the ground that the litigation is at an end, which order plaintiff seeks to review on writ of error, awarded plaintiff his costs as between attorney and client, and charges and expenses properly incurred. The exact language of the order is that plaintiff have "reasonable allow-"ance for his costs, disbursements, and attorneys' fees in "the said action, as contemplated by law" (113 Cal. Rep., 649-656).

Pursuant to this award, plaintiff, on September 25th, 1896, moved the trial Court to fix such allowance; but being met by contempt proceedings based upon an injunction of the United States Circuit Court for the Ninth Circuit, he was thereby prevented from having said motion heard till the orders adjudging him guilty of contempt were set aside by this Court, February 15th 1897 (*Ex parte* Chetwood, No. 7, Original, October term, 1896).

47 He then renewed his motion in the trial Court; but having meanwhile sued out writs of error No. 673 and 674 to review the two decisions of the Supreme Court of the State in this action, the trial Court ruled that the resulting *supersedeas* not only stayed the execution of the decree directing the funds to be turned over to Stateler, but also prevented any action in the matter of the allowance awarded plaintiff and asked for by him, and on March 19th, 1897, denied the motion for this reason (supra p. 44.)

The trial Court further ruled that no allowance should be made for proceedings in the Supreme Court of the United States, because in its opinion such proceedings, to wit, the said writs of error, are "ill-advised."

Plaintiff therefore now renews his motion in this Court, and to countervail the last mentioned ruling brings herewith a petition and affidavits showing that the corporation, and its officers, and the whole 355 shares of stock interested in the funds in Court, desired such writs sued out and desire them prosecuted and the funds in Court made available for paying costs and counsel fees thereon.

48 He shows that under the maxims, "*qui sentit commodum, sentire debet et onus*," and "equality is equity," the defendant in error Thomas can claim no share in the funds, since if he is released at all he is released by the act of his co-defendants, who, when they paid in this money, agreed that they and their stock should not share therein.

He further shows that the proceedings taken by Stateler to prevent the hearing on said writs of error were all taken at the instance of said Thomas, and that if Stateler succeeds in getting control of the fund, or any of it, Thomas will reap the benefit, and thus be the gainer by his own wrong.

That counsel now engaged in prosecuting said writs of error have not been paid, and that all parties interested, the corporation and the owners of the 355 shares of stock, in whose interests the suits are prosecuted, desire them paid out of the funds in Court and an allowance made for that purpose.

The power, we believe, rests with this Court in its discretion to make such order or direction with regard to the custody of the funds pending the litigation as will enable the corporation and the said minority to enforce its rights in

49 said funds, meanwhile protecting all parties.

Spring *vs.* S. C. Ins. Co., 6 Wheat, 519.

A Court of Equity has power to make such allowances to parties out of funds in course of administration as justice and equity require and will protect its solicitors.

Trustees *vs.* Greenough, 105 U. S., 527.
Grant *vs.* Lookout Mt. Co., 93 Tenn., 691.
Cowdrey *vs.* Galveston R. R., 93 U. S., 354.
Merwin *vs.* Richardson, 52 Conn., 225.
Ex parte Plitt, 2 Wall, Jr., 459.
Fecheimer *vs.* Baum, 43 F. R., 719.
Adams *vs.* Keppler, 38 F. R., 281.
Louisville, etc., Co. *vs.* Wilson, 138 U. S., 501.
Gavin *vs.* Norton, 38 F. R., 200.

Where a fund is realized by exertions of plaintiff, all costs as between solicitor and client will be allowed. (Daniel, Ch. Pr. 1437.) Where the costs are to be paid out of the party's own fund, the allowance will include all costs consequent upon the proceeding. (*ibid*, 1440.) In such case the broadest possible order will be made giving "costs, charges and ex-"penses properly incurred." (2 Smith Ch. Pr., 638.)

In taxing costs, a solicitor is entitled to be paid not
50 only for such proceedings as he takes necessarily, but also for proceedings which the client directs to be taken. (2 Barb. Ch. Pr., 339 (note O), citing 2 Smith Ch. Pr. 638.)

A plaintiff should be allowed from a fund costs of an appeal decided against him, where he acted as a representative of many. (Irons *vs.* Man. Nat. B., 36 F. R., 843.)

The writs of error in this cause were sued out to prevent a very plain miscarriage of justice. Motions to dismiss have been made, and if granted, plaintiff and the corporation must abide the judgment of the State Courts.

But the writs having been allowed, after an examination of the records by a Justice of this Court and by the Chief Justice of California, costs incurred, and counsel who tried the case having deserted the cause when it seemed lost, we respectfully submit that the corporation and plaintiff and the minority of 355 shares—the real parties in interest—are
51 entitled to have their costs and counsel employed by them to prosecute the writs of error paid out of the funds in Court, and that this Court will so adjudge, and will provide for the same by proper order.

The defendant Thomas, through his appointee, Stateler,

has control of funds which he is using ostensibly in the interest of the bank, but really, as the facts show, in the interest mainly of Thomas himself (p. 9, 11 and 17 orig., ante).

The corporation and its directors and plaintiff on the other side, on behalf of all parties interested, should have control of the funds obtained by plaintiff's active prosecution of this cause, not only that the liability of defendant Thomas to the bank may be enforced, if possible, and his efforts to get rid of the same thwarted, but also for the protection of the interests of the said minority in the said funds in Court in case the payment of those funds into Court had the effect of releasing the said defendant in error. Further, we submit that an allowance should be made to plaintiffs in error from
52 the funds in Court with which to meet costs as between attorney and client in this Court, as well as all costs, charges and expense of the corporation properly incurred; that the remainder of said funds should be retained subject to the disposition of the corporation under the direction of the Court having jurisdiction of this cause until the litigation is ended and the question of the liability of defendant Thomas settled by the Court of last resort, and the claims of the bank and the minority stockholders herein enforced against him.

That this Court has power to make such order by virtue of the first writ of error sued out, to wit, Cause No. 673, and that such order is under all the circumstances of the cause necessary and proper and the application properly made to this Court, by reason of the rulings of the Judge now presiding over the final Court. Respectfully submitted,

ROBERT RAE and E. G. KNAPP,
Counsel for Plaintiffs in Error.

Filed April 16th, 1897.

ADMISSION OF SERVICE.

Service and receipt of copies of the foregoing notice of motion, submission, verified petition, certified copy bill of exceptions, certified copy of order, and brief of argument admitted this 16th day of April, 1897.

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JAN 10 1898
JAMES H. MCKENNEY
Clerk

Brief of Knapp for E. G.

October Term, A. D. 1897. No. 98.

IN THE

SUPREME COURT

Filed Jan 10, 1898.

UNITED STATES.

THE CALIFORNIA NATIONAL BANK,
Of San Francisco,
Plaintiff in Error,

vs.

RICHARD P. THOMAS,
Defendant in Error.

Error to the Supreme Court of the State of California.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

E. G. KNAPP,
Counsel for Plaintiff in Error.

Filed this ____ day of January, 1898.

_____ *Clerk,*

By _____ *Deputy Clerk.*

United States Supreme Court.

Errors and Omissions.

California National Bank v. Thomas, No. 275. Plaintiff's briefs.

Pages 26, line 3, to page 30, are misplaced. They are part of second point, and should be read between citations and subdivision 3 at top of page 37, as part of page 37.

Page 41, second paragraph, read "procedure" for "process."

Page 41, third paragraph, read "Superior" for "Supreme Court."

Page 54, line 4, read "effected" for "affected."

Page 58, lines 1, 2, 3, should be in italics, as a subhead.

Page 61, lines 3 to 10, are FOURTH POINT, and should be so printed with the proper type and heading.

Page 68, last paragraph, citation is section 111, Pomeroy's Remedies and Remedial Rights

Page 68, last line but one, begins a new paragraph with "It was settled law."

Page 69, the first and last citations on the page are from Robinson's Civil Practice.

Page 88, the heading on this page, printed in capitals, belongs at top of page 87.

October Term, A. D. 1897. No. 275.

IN THE

SUPREME COURT

OF THE

UNITED STATES

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

THE CALIFORNIA NATIONAL BANK, of San Francisco,
Plaintiff in Error.

vs.

RICHARD P. THOMAS,
Defendant in Error.

Brief on Behalf of the Plaintiff in Error.

STATEMENT OF THE CASE.

This action was originally brought in the Superior Court of the City and County of San Francisco by John

Chetwood, Jr., as a stockholder in the California National Bank of San Francisco, on behalf of the bank and all other stockholders therein, against three of the officers of the bank, Richard P. Thomas (now the defendant in error), Robert R. Thompson, and Robert A. Wilson, as defendants.

Complaint.

The complaint is indorsed and entitled "Bill of Com-"plaint in equity for accounting and settlement of trust "by the defendants, Richard P. Thomas, Robert R. "Thompson, and Robert A. Wilson." The record shows the following facts:

The bank had failed, and the comptroller of the currency had appointed S. P. Young, receiver of its assets. Plaintiff Chetwood avers he had asked the comptroller, the receiver, and the board of directors to bring the action, but that they each and all had refused so to do, and he therefore made the receiver and the corporation parties defendant. (Marg., pp. 22, 23.)

The pleading sets forth the organization of the bank under the laws of the United States, with a capital stock of $200,000.00, divided into 2,000 shares; that plaintiff subscribed for twenty of these, and paid in the full par value $2,000.00; that he has never parted with these twenty shares, but still owns them.

The adoption of the articles of association required by the Revised Statutes is set out. These fixed the number

of directors at seven. The averment is then made (Marg., p. 4) that these articles of association provided

> "That the board of directors of said corporation should have "power, and it was made their duty, from their number to elect "a President and Vice-President, define the duties of the officers "and clerks of the corporation, and make all by-laws . . . . "for the general regulation of the business of the corporation, "and the management and administration of its affairs."

Directors were elected, and it is averred that these three defendants, Thomas, Thompson, and Wilson, were on the board from the date of the bank's organization continuously till the suit was brought. A code of by-laws, it is alleged, was regularly adopted, and remained in force all this time.

Then follow (pp. 5 to 8) sections 7-17 and 18 of these by-laws, pleaded at length. They define the duties of the president and vice-president, and provide for the appointment of an executive committee of the directors, of which committee these two officers are ex-officio members.

Section 7 deals with the duties of this committee, requiring it to "have and exercise immediate supervision of all the officers of the bank."

Section 17 gives the President "general control and supervision of the affairs of the bank," makes him "responsible for all sums of money and personal property of every kind, which may be intrusted to his care or come under his control as President"; directs him to "perform

all duties required of him by the bank laws of the United States," and gives him also "supervision of all employees of the bank," with power to "suspend them when necessary, reporting his action and occasion therefor to the board of directors at its next meeting."

Section 18 requires the vice-president to assist the president.

After the adoption of these by-laws, Thomas, it is alleged, was elected president, Wilson, vice-president, and Thompson was appointed the third member of the executive committee, with the two former as ex-officio members.

The bill of complaint continues (marg., p. 9): "That thereupon each of said defendants, Thomas, Thompson, and Wilson, duly accepted said offices," and (p. 10.) "That upon their said election and appointment as such officers, the said three defendants severally, and as such president, vice-president, and executive committee, duly accepted the position of the respective officers, and as provided in the above-mentioned code of by-laws and the above-quoted sections thereof, and duly accepted the trusts and obligations to perform each and all of the duties therein prescribed, with due skill, care, attention, prudence, diligence, fidelity."

The duties of these officers and of the committee are enlarged upon further, and at page 12 m., is the averment:

"That well knowing each and all of said facts above recited, said three named persons defendants, Thomas, Thompson, and Wilson, severally, being fully aware of the nature and extent of said trust, and the duties thereof, accepted and retained the said trust, and unto the said corporation promised faithfully to dis-

"charge the same, and each and all of the said duties thereof in a "proper, careful, and judicious manner, ... and the said cor- "poration fully confided in their fidelity and diligence, and so "confiding, intrusted to said three persons the discharge of the "said duties, and duly appointed and retained them in their re- "spective offices."

They held these offices, it appears, from the date of their appointment immediately after organization of the bank till its failure, Thomas being president and member of the executive committee, all this time, as well as director: Wilson, vice-president, director, and committeeman. Thompson held no position, but that of director and member of the Committee.

Then follow averments showing that the bank began to do business, but that these defendants failed to attend to their duties. The language of the bill here (p. 13, m.) is

"Not regarding their aforesaid duties, nor their respective and "concurrent promises in that behalf, but wholly disregarding the "same, and contriving together to injure and deceive the said cor- "poration, (they) neglected and omitted, without any reasonable "excuse to exercise their own skill, care, judgment, and discretion "in the making of loans and discounts out of moneys in the pos- "session of said bank, and otherwise directing the business of "said bank, but they negligently permitted the cashier of said "bank to control and manage the whole business of said bank as "he saw fit, and without consulting or in anywise informing said "defendants, or any or either of them, to lend the moneys of said "bank at his own pleasure, etc."

This course of dealing wrecked the bank. The cashier, to whom everything was left, proved incompetent and

dishonest. The entire details of the misuse of the funds of the bank, the plaintiff avers, he does not know (marg., p. 14). He, however, alleged quite a large number of transactions, amounting to a course of dealing with certain favored persons, which he averred caused losses to the bank in amounts aggregating something over $200,000. And these losses, it is charged, necessitating suspension and liquidation, caused the destruction of the capital of $200,000.00—the loss, further, of a surplus of $30,000.00—and resulted in the levying by the comptroller of an assessment aggregating $75,000.00.

It appears (mar., p. 21) that some $20,000.00 of the portion of this assessment levied on the stock of Mr. Thomas is still unpaid; though all the other stockholders, plaintiff included, paid their proportion of the assessment in full.

These burdens and losses including the amounts paid on the assessment are all pleaded as "the direct and inevitable result of the losses aforesaid," all of which resulted "from the negligence of said executive committee." (Mar. p. 18.) At p. 19 marg. is the following allegation:

> "That said President, Vice-president, and Executive Com-
> "mittee could and should have prevented the occurrence of each
> "and all of the said improvident uses of the money of said Bank,
> "by giving attention to and discharging the duties of their said
> "trust; and, had they done so, none of said losses and improvi-
> "dent uses of money would have occurred. But defendants
> "Thomas, Thompson, and Wilson, utterly neglected their duty
> "in the premises and willfully neglected to take any care or exer-

"cise any supervision of the officials and business of said Bank, "but negligently permitted the said cashier to do as he pleased "with, and misuse, waste, and lose the moneys of the bank, and "by reason of their negligence and omissions of defendants "Thomas, Thompson, and Wilson, and not otherwise, each and "all of the said losses of the corporation occurred."

The defendants are alleged to be able to make good these losses, and the prayer (p. 24) is that they "be held to an accounting of their said trust, that they restore unto said corporation the sum (with legal interest from said loss) so as aforesaid lost by their negligence," for judgment in favor of the corporation, and that "plaintiff do have such further order, decree, judgment and relief as may be meet and agreeable to equity."

Answer.

To this complaint an answer was filed by defendants—Thompson and Wilson, which contains a further provision of the by-laws of the Bank, relative to the duties of the President to wit, section 19. (Ans. of Thompson & Wil-n p. 48, of Record.)

This section still further distinguishes the duties and liabilities of the president from those of the other officers.

By it the cashier is made everywhere subject to the order of the president; he can do nothing without the concurrence of the president. The language is as follows:

"He (the cashier) may, under the direction and with the "concurrence of the President, discount bills, notes, or other evi- "dence of debt and make loans under the same restrictions as the "President (i. e. not over $10,000 to any one person); issue and "sign certificates of deposit, draw checks and warrants upon the "bank, in the ordinary and usual course of its business, and pay "the current expenses of the bank when approved by the execu- "tive committee."

The section of the by-laws providing for an auditing committee to examine into the bank's affairs and make quarterly reports is also (p. 50 marg.) pleaded in this answer.

This pleading of the defendants Thompson and Wilson was expressly adopted by defendant Thomas as his answer (see stip. p. 58, marg.), and under well-known rules its allegations and admissions bind him and supplement the averments of the complaint. Defendant Thomas filed no answer for himself; made no denial of the facts showing him peculiarly and chiefly culpable.

Trial.

On these pleadings the case went to trial, and on April 27th, 1894, the trial Court made the order appearing at p. 59 (marg.) of the record, wherein the court orders that the plaintiff is entitled to have judgment against defendants Thomas, Thompson and Wilson, but for what amount the Court is unable to say without further testimony, for the taking of which a reference is ordered.

The next order recites (marg., p. 60), that "whereas the

"TAKING OF AN ACCOUNT IS NECESSARY FOR "THE GUIDANCE AND INFORMATION OF THE "COURT, the Court appoints T. C. Kierulff, Esq., to exam- "ine the books, papers, drafts, and documents of the "Bank," and report the amount owing the bank on three certain dates from three of its customers named in the order.

The trial proceeded before the referee, and his report filed Aug. 17th, 1894, (rec. p. 63, mar.) It gives the indebtedness of the three favored customers mentioned in the complaint and in the order of reference as these appeared from the books of the bank on July 8th, Aug. 6th, and Dec. 15th, 1888—this last being the date of the failure of the bank. (See Marg. p. 19, 20).

Still there is no decision of the court as to the amount that the defendants are liable for, and no express decision that all are liable in the same amounts; the order of April 27th, awarding judgment, not being the final decision in writing required by the statutes of California in all cases tried without a jury (C. C. P., sec. 632), judgment entered on such an order, even if it had stated an amount or amounts, would be set aside as void. (Van Court vs. Winterson, 61 Cal. 615.)

The Court in its final decision might still render judgment in their favor or against them, and in the same amount or in unequal amounts. The trial of the case is not yet at an end.

Dismissals.

This is the condition of the case Sept. 24th, 1894. On that day (see record pp. 64 to 69 marg.), two stipulations were filed and two orders entered by which the defendants Thompson and Wilson are dismissed from the case. To these proceedings the corporation and defendant Thomas are not parties. As to them the judgments of dismissal are ex parte.

It was, however, only after a full disclosure to the Court of all the facts (as the findings show,) that the dismissals were sanctioned and entered of record.

These dismissals left the suit one to recover against R. P. Thomas alone, sued and described in the pleadings as president, director and member of the executive committee.

As such the action proceeded, the cause having been submitted, written decision ("findings") were filed Nov. 20th, 1894. (Marg. p. 70 to 90.)

Decision of the Trial Court.

As Thomas, the president, is now the sole defendant from whom a recovery is sought, the findings are silent on many points bearing upon the case of defendants Thompson and Wilson, which by reason of the dismissals are no longer issues in the case, and the decision deals principally with the duties and liabilities resting upon Mr. Thomas, the president.

It is found (pp. 77-78 mar.), that he took control and entered upon the discharge of his duties under the by-laws; that the bank paid him a salary regularly (p. 78 mar.) for his services; that it relied upon him and entrusted him with the management of the bank and imposed on him the duties as president under said by-laws, particularly the provisions above recited.

Many specific facts are set out distinguishing his case from that of the other defendants, making his neglect and breaches of his duties and promises more glaring than those of his co-defendants, more culpable in him, and more hurtful to the bank (pp. 80, 81, 85-86, marg.)

Finding 5, for example (marg. p. 81), refers to a report of the auditing committee, containing warnings of the bank's condition (p. 80), and shows that Thomas, the president, had been notified, and his attention specially drawn to this report in July and August, 1888. Again, finding twelve (12) shows (mar. p. 85), that he had "full and constant access" to papers showing improper loans to the three parties named in that and in findings 15 and 16, far above the limit allowed by law. Finding 13 (mar. p. 85) is to the effect that he could easily have prevented all of the said improper uses of money, loans and alleged losses by merely doing his duty under the by-laws, and that had he done so, none of these losses would have occurred; that his failure to do so caused the failure of the bank.

Then follow (mar. p. 87), findings 15 and 16 in these words:

15.

"The amount of the actual loss to the corporation on the three "items, in finding No. twelve hereof mentioned, between the date for "auditing committee's report, and that of the failure of the bank "(July 8th or Aug. 6th to Dec. 15th, 1888.), was the sum of one "hundred and sixty-six thousand nine hundred and nineteen ($166 "919.00) dollars.

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"From the defendants Robert R. Thompson and Robert A. Wilson, "of, for and on account of said loss, there has in this action been col- "lected the sum of twenty-seven thousand five hundred, ($27,500.00) "dollars; leaving a net loss to the bank, of the sum of one hundred "and thirty-nine thousand four hundred and nineteen, ($139,419.00) "dollars.

Judgment was entered in favor of the bank (plaintiff in error), and against defendant Thomas, for this amount, $139,419.00, the unpaid balance of losses resulting from the loans made to the three favored customers mentioned in the complaint and referred to in findings 12, 15, and 16, with interest thereon from Dec. 15th, 1888, the date of the bank's failure, and $319.70 costs.

From this judgment defendant Thomas took an appeal to the Supreme Court of the State. There was no motion for a new trial, and the evidence is not preserved in any bill of exceptions.

Decision of the Appellate Court.

The Supreme Court reversed this judgment, and directed that judgment be entered against plaintiff, releasing

defendant Thomas from all liability. The conclusion and judgment of the appellate court are as follows:

"The plaintiff in this case, by accepting $27,500 from "the two defendants for and on account of the joint tres- "pass of the three, and by releasing them, has released "his claim against the third."

"Intolerable fraud and oppression could be worked if "a judgment such as this, and so obtained, could stand."

"This judgment is reversed and the cause remanded, "with directions to the trial Court to enter a judgment "in favor of the defendant Thomas."

To review this judgment of the Supreme Court of the State, the bank as plaintiff in error sued out the writ under which the record has been transmitted to this Court.

Specifications of Error.

The Supreme Court of the State erred, in the following particulars:

1st. In denying the claim of the bank that its president was liable to it under the by-laws of the bank and the laws of the United States.

2nd. In denying the claim that the laws of the United States and the bank's by-laws adopted by authority of the laws of the United States fix the measure of the duties and liabilities of the president of a National Bank.

3rd. In denying the claim made under those by-laws, and the laws of the United States that the defendant in error is liable to it severally, for the whole amount of its loss.

4th. In holding that there is no element of contract or trust in the case at bar; but that it is a suit "in tort" and against joint tort feasors; and that the agreements and promises of defendants do not affect the cause of action.

5th. In holding that the trial court had adjudged defendants liable jointly in a single amount.

6th. In holding that the action is legal, not equitable.

7th. In holding that the judgments of dismissal in this case amounted to a retraxit, or operated to release or in any way affected the liability of defendant Thomas.

8th. In holding that plaintiff by allowing $27,500.00 to be paid into court on account of the losses of the bank, and dismissing as against two defendants, released the claim of the bank as against the third.

9th. In holding that the judgment as entered on the record, worked an injury to defendant Thomas.

10th. In denying the right of the bank to recover a several judgment for its losses against its president,—the defendant in error; and in reversing the judgment entered by the trial court.

Argument and Authorities.

A motion to dismiss has been submitted, but not ruled upon, and we refer in the course of the argument to the jurisdictional questions, though briefs were filed on the motion.

The case when it came before the Supreme Court of the State was a suit to recover against defendant in error alone.

It became so before findings were filed or the trial ended, by the dismissals in the lower court.

It is this several liability, resting on defendant in error clamed under the by-laws pleaded, and the statutes of the United States, and the right to recover thereon a several judgment against him in this action, which were denied to the corporation by the decision and judgment of the Supreme Court of California.

The point that the liability existing and declared upon is something ultra the Statutes of the United States, the by-laws and articles of the bank, and its agreements with its officers, is the basis on which the state Supreme Court rests its final judgment that all liability ceased when two defendants paid a portion of the bank's claim and obtained judgments of dismissal.

We refer in this connection to the briefs filed in opposition to the motions to dismiss for want of jurisdiction.

FIRST POINT.

The suit is not in tort; the defendant in error is not a mere tort feasor, the defendants are not sued as joint tort feasors. The action is one brought to enforce contracts of the officers to give their services to the bank, and abide by and perform the duties prescribed in the by-laws, articles, etc., adopted and validated by the laws of the United States. Herein of the jurisdiction.

The Supreme Court of the state in their decision admit the existence of an agreement on the part of defendant in

error to discharge with due care the duties prescribed in the bank's by-laws; but insist that there is another and more general duty than any flowing from this contract—one independent of the contract, and that the action is to enforce the latter alone.

"With or without contract," it is said in the opinion, "the duty is imposed upon all not to injure the property "of another. And for a failure to observe that duty the "right of action in trespass for the tort exists. Such is "the cause of action here set up."

Admitting the existence of such a contract as pleaded however, it is clear that this suit is one to enforce the obligation of that contract, and to recover for a breach thereof. It is said by a learned English writer (Pollock) on Torts, that the "overlapping of contract and tort gives "rise to troublesome questions.

"For the obligation of many contracts is, by usage and "the nature of the case, not to perform absolutely, but "to use all reasonable skill and care to perform it. "In "such case a total refusal or failure to perform the con-"tract is rare. The kind of breach commonly complain-"ed of is want of due care in the course of performance." (Pollock on Torts, p. 354.)

The question as to the nature of the duty and of the proper action, is now, however, as it was when the action of trespass on the case first came into use, largely a matter of practice.

When actions were distinguished as at later common law by the form of the declaration, the question as to

whether a suit be in tort or contract could of course not arise.

But in California, all forms of action are abolished. There is now but one form wherein the facts must be set out. Plaintiff has herein set them forth, and could have no second action. The action brought is at the least as much one for breach of contractual rights as to recover for a tort.

The joint and several contracts of agency are pleaded; and any facts added thereto showing negligence or even fraud or oppression in such case, would not make the action one in tort.

"The rules founded upon the distinction at common "law between actions of contract and of tort are alike "inapplicable to California practice. Every action under our system may be termed an action on the case."

Jones v. Str. Cortez, 17 Cal. 487, 489, per Cope, J.
Pomeroy's Rem., sec. 573.

Mere forms of action in this State have been cast aside. Rogers v. Duhart, 97 Cal. 504 (citing Jones v. Cortez), where the following language is used by Paterson, J.:

"Does the complaint state in ordinary and concise lan-"guage facts sufficient to constitute a cause of action? "This is the question, not whether it is sufficient to show "trespass quare clausum fregit, trespass vi et armis, or "any other technical form of action ex delictu or ex contractu."

To cases such as that at bar, brought under the Code system, the language of the learned writer quoted above

is specially apt in this connection. He says (Pollock on Torts, p. 437):

"Now, that the forms of action are generally abolished "or greatly simplified; it seems better to say that where- "ever there is a contract to do something, the obligation "of the contract is the only obligation between the parties "with regard to the performance. And any action for "failure OR NEGLIGENCE therein is an action on the "contract; and this whether there was a duty antecedent the contract or not."

Where the duty flows or is derived from the contract, the action is on the contract, though negligence is charged.

Stark v. Wellman, 96 Cal. 400.

The breach of a contract is often negligence.

The decision in Burrows v. Marsh Gas Co., is rested on the ground that negligence of defendant was the proximate cause of the damage.

"But, as is pointed out in a treatise of authority (Bige- "low on Torts, p. 611), the true ground for the decision is "that taken by Cockburn, C. J.

" 'The action is not for negligence in its ordinary sense, " 'but for the breach of a contract whereby defendants " 'promised to supply the plaintiff with a proper and suf- " 'ficient service pipe from their mains to a gas metre " 'within his premises, and the question is whether there " 'has been a breach of this contract.' "

Beven on Negligence, p. 72.
Burrows v. Marsh Gas Co., L. R. 5 Ex. 67 (7 Ex. 96.)
Lamer v. Alb. Gas Co., 44 N. Y. 159.
Armstrong v. Luco, 102 Cal. 272.
Burns v. C. & B. R., 13 Ir. C., L. R. 542-546.
Austin v. G. W. R. Co., L. R. 2 Q. B. 442.

So in the case at bar there is a contract of agency—the mandatum of the Roman law. And the by-laws themselves, as between the corporators are in the nature of a compact.

Kent v. Quicksilver M. Co., 78 N. Y. 159, 179.
Poultney v. Bachman, 31 Hun, 49.
The Bank v. Guice, 2 La Ann. 249.
Thompson on Corporations, sec. 940.

The obligation of each of these contractual relations has been violated under the facts of this case.

But the Court, in deciding the case, say that the promise or the averments of the promises and agreements made to discharge the duties of the trust were unnecessary; that "the law imposed upon them the duty of using "due care when they agreed to discharge their duties as "members of the committee."

So it might be said of every duty, however, created or arising, it is the law which imposes the duty and gives the remedy. The law is the cause, the contract or other relation but the occasion of the obligation. (Pomeroy Con. Law, secs. 590-91). And if there be in the case of defendants a double duty—one ultra the contract and by-

laws, as well as one by virtue of the contract and the by-laws, we have declared upon the latter, and it is for us, not for the Court, to make the election, which right we will seek to enforce, which remedy we will ask. (Rich v. N. Y. C. R. R., 87 N. Y. 382.)

If the Court's language here imports that there is no duty that it is bound to enforce save that existing before and without or independent of this contract, then the right to make a binding contract fixing and defining the duties and liabilities of the bank's officers, and the right to enforce and recover on that contract is denied to the bank in this action. The right to bind the directors and president by their agreement to observe the by-laws is denied.

Even if all the by-laws be taken into consideration in determining the character of the so-called tort, there is a wide difference between the liability of defendants, if they are held under their contracts, and that attaching under the general law of torts to the positions held by them.

The very point upon which the State court confidently rests its final decision releasing the president from all liability is that he is, as the Court argues, sued for a pure tort, and not for a breach of contract or of trust.

If the liability of defendants (or defendant in error) is for breach of contract or for a breach of trust, even if they be all equally liable as joint debtors and not severally, then would the general rule (now statutory in Cal.) apply that a release of one would not release the others.

This rule is enacted in Cal. Civ.Code, sec. 1543.

"1543. A release of one of two joint debtors does not "extinguish the obligations of any of the others, unless "they are mere guarantors, nor does it affect their right "to contribution from him."

This would prevent the operation of the rule applied to exonerate Thomas if the suit is on a joint contract.

If the contracts are several, as we plead them, then, certainly, Thomas is not released. In either case, the rule deduced in the opinion under discussion from the assumed tortious character of the breaches of duty would not suffice to release defendant in error, and the dismissal entered as to the others would affect his liability in no respect whatever.

A.—The right to hold defendant in error severally liable under the by-laws is a right claimed under laws of the United States. The decision that the action is "in tort" for breach of a general common-law duty denies this right by denying any binding force in the by-laws. The decision that no claim is made in the complaint that any several liability rested on any defendant denies the same right, the sufficiency of the facts pleaded being a question for this Court.

The by-laws must be considered as a fact, even if the liability should be conceded to be purely tortious, as for negligence. The question of negligence of directors particularly is ultimately and in all cases a question of fact to be determined under all the circumstances.

Empire St. Bnk. v. Beard, 88 N. Y. 189-192.

Sayles v. Cent. Bnk. of Rome, 41 N. Y. Sup. 1063, (citing) Briggs v. Spaulding, 141 U. S. 132.

These by-laws fix the duty, and that is the measure of the required care (Cooley on Torts, p. 526). They are therefore the controlling factor.

If a State court can disregard the obligations imposed by them, and hold that they may be disregarded in a case where they are distinctly pleaded it can set up a standard of its own whereby the duties of the officers are defined. Such ruling deprives the bank of an important right claimed under federal law to hold each officer accountable strictly as provided in the bank's by-laws and laws of the United States, and require performance of all, not part of, the obligations there imposed.

The decision allows the duty of the officer in one capacity (as member of the executive committee) to nullify the duty resting on the President, though that duty is pleaded, and the facts showing breaches of the President's duty practically admitted in the pleadings.

It is said no negligence of the President as President, is pleaded. That is to disregard the facts set up in the complaint and to deny plaintiff the right to enforce the obligations imposed by the by-laws pleaded relating to the duties of the President.

What the defendants do or omit to do in one capacity they do in all. They are sued as individuals, not in a representative capacity.

The obligations rest on defendants by virtue of the by-laws and the statutes of the United States, wholly independent of the common law or law of torts.

The by-laws are as binding on the members of a corpo-

ration as a public law of the land, though the sanctions may be different.

Cummings v. Webster, 43 Me. 192.
Weatherby v. Med. Soc., 76 Ala. 567.
Thompson on Corpns., sec. 939.
Kent v. Quicksilver M. Co., 78 N. Y. 179.
G. G. Cong. v. Pressler, 17 La. Ann. 127.
Un. Bnk. v. Guice, 2 La. Ann. 249.
Brick P. Ch. v. Mayor, 5 Cow. (N. Y.) 538.
Samuel v. Holladay, Woolw. (U. S.) 400, pr. Miller, J.
McDermott v. Board of Police, 5 Abb. Pr. 422.

We quote from the last citation the following:

"By-laws, rules , and regulations of the Board of Po-"lice, for trial and removal from office, being expressly "authorized by the legislature, and being in conformity "with the power there conferred, have the same force and "significance as though they were enacted by the legisla-"lature."

It is proper and necessary to plead the by-laws (as plaintiff did) when a breach of a duty they impose is counted upon.

Union Bank v. Ridgely, 1 Han. & G. (Md.) 324.
Olds v. Chicago B. T., 18 Ill. App. 465.
Middletown B. v. Russ, 3 Conn. 135.
Gray v. Nat. B. A., 111 Ind. 531.

If this obligation of the by-laws is not contractual as plaintiff pleads it, it is still one flowing from the laws of

the United States, which authorize the enactment of by-laws to define the duties of the bank's officers; and the right denied in this case, the right to recover against defendant in error, is one claimed under the statute of these United States.

"The cause of action rests upon the requirements of the "laws of the United States and by-laws made pursuant to "such laws, and therefore is one arising under those laws, "jurisdiction over which is not taken away by the Act," per Wheeler, J., in

Witters v. Foster, 26 F. R. 737 (23 Blatch. 457).

referring to the Act of June 3d, 1882, defining the jurisdiction of United States courts in cases affecting national banks.

B.—The enactment of these by-laws by the corporation is an exercise of an authority under the laws of the United States, and the State Supreme Court called this in question and decided against the validity of this authority, by its ruling that the common law, not the Statute of the United States, and the by-laws created the duty declared upon here.

The common law cannot be said to do more than give a remedy, but the remedy or right to sue as for a common-law tort is not the right claimed. On the contrary, the plaintiff claimed the right under the United States statute to recover, by force of the duties there and in the by-laws imposed, the whole sum lost, and an immunity from the rule that torts applied to release defendant in error.

In McNulta v. Lochridge, 141 U. S. 331, a claim by a receiver of a railroad, under United States laws, to immun-

ity from suit without previous leave of court the decision being adverse to his claim, was held to give this Court jurisdiction. It is said in the opinion: "He was, as receiver, exercising an authority under United States laws."

Citing Buck v. Colbath, 3 Wall. 334;
Feibelman v. Packard, 109 U. S. 421;
Railroad case, 115 U. S. 1.
Etheridge v. Sperry, 139 U. S. 266;
Bock v. Perkins, 139 U. S. 628.

The motion to dismiss was denied, though the defense was held invalid, and the motion to affirm granted.

The case is affirmed in Metropolitan Bank v. Claggett, 141 U. S. 520, and cited on this point.

It is not necessary that the construction of the laws of the United States be involved under section 709, Rev. Stats. It is enough if the right in question come from an authority exercised under the United States.

Carson v. Dunham, 121 U S. 421.

Stanley v. Schwalby, 147 U. S. 512, was a suit in trespass to try title to land against agents of the United States. The United States appeared and pleaded the statute of limitations; the pleas were stricken out, and the case dismissed as to it. The case in this Court was reversed for refusal to allow the United States agents the right to plead the statute of limitations.

The decision against defendants (United States agents) involves the validity of an authority exercised under the United States, and the final judgment of the State Court

being against its validity, jurisdiction exists in the Supreme Court to review that decision on writ of error—per Fuller, C. J.

1.

By section 17 of the by-laws (marg., p. 6), the president is authorized to make loans "not exceeding $10,000 to any single individual, firm, or corporation."

By section 18 (marg., p. 48), the cashier is under the same restrictions in this particular, besides having no power to make loans without consent of the president.

From the referee's report (marg., p. 63) and the decision of the Court (marg., pp. 85, 86, and 87), it appears that loans were made by the cashier to three different persons, exceeding in each case the above limit. On December 15th, when the bank failed, these three persons owed the bank, on unsecured loans made by the casheir to them, the following sums respectively:

David Guttman, indebtedness, Dec. 15, 1888, $70,622.49.
J. H Woodward, indebtedness, Dec. 15, 1888, $75.385.00.
D. C. Wickham, indebtedness, Dec. 15, 1888, $51,085.42.

These are the loans, and these the items on and by reason of which the loss of $166,919.00, is charged against defendant and for which judgment was rendered (marg., 87), occurred

The total debts of these three borrowers at the date of the failure aggregating $192,092.91, which was $167,092.91 in excess of the amount the president and cashier were given power under the by-laws to loan to any three persons.

This excess is practically the loss (within less than $200.00 of the actual amount) occurring by reason of these loans, and the amount for which judgment was ordered entered; or for which defendant Thomas was held liable.

2.

The trustees or directors, and the executive committee, were not limited to $10,000.00 in making loans. Their power would be limited by the Revised Statutes, section 5200, in making loans to $20,000.00, being one-tenth of the bank's capital.

These three items were each in excess of this amount, as well as in excess of the amount fixed by section 17 of the by-laws.

Under section 5239, Revised Statutes, therefore, (if they assented to the same), each of the defendants would be "individually and personally" liable for all damages sustained in consequence.

But Thompson and Wilson might plead ignorance, and so escape liability under this statute. The case of Thomas is different. He, as president, is charged with notice of all acts of the cashier, who can act in such matters only under his direction and with his concurrence. He, the president, is liable for this whole loss under the provision of the by-laws last quoted, and under this section of the Revised Statutes as well. He is clearly guilty of infractions of the provisions of both.

Clews v. Bardon, 36 Fed. Rep. 617.

Stephens v. Overholtz, 43 Fed. Rep. 465.

Bailey v. Mosher, 63 Fed. Rep. 488.

Joint Stock Co. v. Brown ,(1869), 8 L R. Eq. Cas. 380-404.

Second Nat. Bk. v. Burt, 93 N. Y. 233.

He must be held to have assented to every act of the cashier, for without such assent and concurrence the cashier had no power to act at all. The other directors under the pleadings are not charged with assenting, and are not liable under this section of the statutes.

The nature of the liability, as something besides a mere tort, appears from this consideration.

The president exceeded his powers under the by-laws in making these loans. Whether done designedly and willfully, or inadvertently and negligently, does not alter the fact that there has been a plain breach and infraction of the duty or obligation imposed by and under the by-laws.

For this act, the law, if damage results, will give a remedy. But that remedy is not a right to recover damages against the president for negligence. Independent of negligence, he has broken a positive term of the by-laws, exceeded his powers The liability is either contractual, or, as we think, statutory, depending, as it does, on the right given by the statute to enact by-laws defining and limiting powers of the bank's officers. The statute (5239) is held to be remedial, not penal, and the liability one that does not abate by death, as in case of a tort.

United States v. Dewey, 39 Fed. Rep. 251.

Stephens v. Overholtz (supra).

Further, the liability is not joint. The president has been guilty of an act ultra vires under the by-laws; the other defendants have not exceeded their powers, not being privy to those loans, not having assented to them, and are not liable unless they have been guilty of a breach of their contracts or their duties, under the by-laws, the laws of the United States, or the common law.

The president, if liable under section 5239, is liable, because of the statute, in his personal and individual capacity, for the whole damage, not as for a tort by reason of negligence. (See cases last cited.)

Whether it be this statute or the by-laws and the statutes giving them force and sanction under which the president is liable, the claim is made under both, and a denial to that claim by the judgment of the Supreme Court of the State raised a federal question.

Even at common law the duties of a president are more onerous, his responsibilities greater than those of the other officers.

Thompson on Corpns., 4683 (vol. 4), cases cited.
Morawetz, 537-8.

Under the United States laws and these by-laws the duties of the chief executive officer are still further increased and distinguished from those of the other officers.

If the cause of action were a pure tort, the action would die with the death of defendants. It is held otherwise in actions of this character.

Witters v. Sowles, 31 Fed. Rep. 4.
Stephens v. Overholtz, 43 Fed. Rep. 465.

Lee's Admr. v. Hill, 12 S. E. 1052.
United States v Dewey, 39 Fed. Rep. 251.

Moreover, there is good authority that in cases such as that at bar, where the injury is not the direct result of the acts of defendants themselves, but their failure to direct and oversee the acts of others, no action at law in tort or at all lies. The plaintiff must find his remedy in equity, which will permit no wrong to go unredressed.

Trustees v. Bossieux, 3 Fed. Rep. 830-831.

We respectfully submit that the plaintiff in error claimed in the case at bar the right under the laws of the United States to disregard the common-law duties attaching ordinarily to the position of president of a bank, and asserted the right to define the duties of its president for itself in its own organization and laws, to make those the basis of its contract with them, and for a breach of them brought suit, seeking to recover for that breach of duty, in contract, declaring upon the contract of agency and the duties in the by-laws.

That this right claimed included and includes the right to hold each severally, or all, strictly to account, and to recover damages that should be a debt, and not a mere claim for tort to be satisfied or released by release of one or by the death of those sued.

That the by-laws and contract of agency are sued upon in this action, and these are made under express authority of federal statute. That the right to proceed against

all of the three, to dismiss against two, on part satisfaction, and to have and recover thereafter a several judgment for the whole unpaid balance of the loss, was asserted and claimed under and claimed by virtue of the provisions of the United States laws, to which we have referred.

These rights so claimed the State Supreme Court denied, and in so doing erred.

This Court has jurisdiction to review the decree of the State court in such case:

Osborn v. Bank, 9 Wheat. 823-4.

Pac. R. R. cases, 115 U. S. 1-13.

Walker v. Windsor Bank, 56 Fed. Rep. 76-80.

Gulf v. Hefley, 158 U. S. 98-100.

Davis v. Elmira S. B., 161, U. S. 275.

McClellan v. Chipman, 164 U. S. 347.

Witters v. Foster, 26 Fed. Rep. 737.

And cases cited supra and in former brief on motion.

The sufficiency of the facts pleaded and relied upon to make out a case under the United States laws is a question for this Court to decide.

Mitchell v Clark, 110 U. S. 633.

Covington etc. Co. v. Sandford, 164 U. S. 579.

SECOND POINT.

THE PLAINTIFF claimed the right in the trial court and in the State Supreme Court to TAKE JUDGMENT

AND SUSTAIN THE SAME AS AGAINST THE DEFENDANT IN ERROR, THE PRESIDENT, UNDER SECTIONS 5200 and 5239 of the Revised Statutes of the United States. That right was denied by the judgment of the Supreme Court of the State. In this the State Supreme Court erred, and their judgment should be reversed. The judgment given in the trial court was fully sustained by pleadings and proofs and should stand.

This point was made in the brief filed in opposition to the motion made to dismiss, but by some error there the Court is referred to section 5204, Revised Statutes, instead of 5200 as the basis of plaintiff's claim.

By that section (5200) the bank (plaintiff in error) and its officers were forbidden to allow the total liabilities of any one person, company, firm, or corporation (including in the liabilities of a company those of the several members thereof), to exceed at any one time one-tenth part of the capital of the bank. "But," the section continues, "the discount of bills of exchange, drawn in good faith "against actually existing values, and the discount of "commercial or business paper actually owned by the per-"son negotiating the same shall not be considered as "money borrowed."

The language of the statute is guarded. A discount of bona fide secured bills, or a purchase of commercial or business paper actually owned by the negotiator, is not a loan.

The plain inference from this is that a purchase or discount of bills or notes totally unsecured save by the per-

sonal liability of party selling or negotiating them, to-wit, drafts and notes made by the party himself, or discounts made in bad faith as in the case of loans made on the faith of indorsements by parties known to be at the time without means or credit, are to be regarded as they of right should be, and in fact are—merely as loans to the party making the paper or receiving the money.

The bank is not forbidden to buy drafts drawn by the negotiator, and unsecured or unindorsed. But such transaction (unless the drafts be in some way secured) is by the statute rightly made a mere loan; and loans to any one person or firm, however responsible, must not under the statute exceed (in case of this bank) the sum of $20,000.00.

Such were the transactions of this bank, had through its cashier, with the favored customers, Woodward, Guttmann, and Wickham—the three borrowers on whose accounts the loss of $166,919.00, for which judgment was given, occurred.

The transactions are set out in detail in the bill (marg. pp. 15, 16, 17). The dealings with Wickham are stated to have been a borrowing merely, a loan creating a simple indebtedness, unsecured to the extent of $35,000.00.

Those of Guttmann and Woodward are charged as the purchase (not the discount) of bills of exchange, drawn by the men themselves, unsecured, in any way, unindorsed, unaccepted certainly by any responsible person.

Those of Woodward are charged to have been of such a character that it was injudicious, even reckless, to buy

them at any price, and plaintiff avers that the cashier knew this.

Taken in connection with all the allegations at p. 14 (marg.), wherein these acts are characterized as a purchase of pretended , rather than real securities, they may easily be said to have been made in bad, rather than good, faith, and thus without the exception of the statute.

There is practically no difference between the purchase and the discount of commercial paper by a bank. Both are but "modes of loaning money."

Pape v. Capital Bk., 20 Kan. 440.

Atlas N. B. v. Savery, 127 Mass. 75. (Morse on Banking).

Brown's Ex. v. N. S. B . of Eliz.,73 U. S. App.

Simmons v. Fisher, 55 Fed. Rep. 914.

The statute speaks solely of discounts; the transactions are styled loans, both before and after their recital (record, marg. pp. 14, 16, 17). A deposit in bank is a loan under this provision.

Bank v. Lanier, 11 Wall. 369.

The Court found that these were loans. The order appointing referee (p. 60) directs an account to be taken to determine the amount "due and owing" from these three persons—Woodward, president of the Alameda Co. R.R., Guttmann, and Wickham—on three different dates.

These dates, July 8th, 1888, Aug. 6th, 1888, and Dec. 15th, 1888, were respectively the dates of the following

important transactions in the history of the bank. On July 8th 1888, the auditing committee of the directors made a written report of the affairs of the bank, showing it to be doing an unsafe business.

On Aug. 6th, 1888, this report was filed with the papers in the president's charge. On Dec. 15th, 1888, the failure occurred. (See Findings, marg. pp. 79, 80.)

The referee reports that these three persons were "indebted" to the bank in large sums at each of these dates, and the amount of "indebtedness" of each on each of these days is given. (Marg., pp. 69, 63.)

The Court found these men to have beeen mere borrowers (marg., pp. 85, 86, 87, Findings), besides finding the transactions in detail substantially as in the complaint (Findings 8-10), and throuhout the decision (as in the pleading), they are styled and characterized as "loans."

On Dec. 15th, 1888, when the bank closed its doors, each of these three men owed the bank sums far in excess of the limit fixed by section 5,200, Revised Statutes. Guttmann owed $70,622, Woodward $75,385, Wickham $51,085, aggregating over $197,000.

This was $167,000.00 in excess of the amount which the president and cashier had power to loan them; even if the borrowers had been men of ample resources and was $137,000.00 more than the bank had power to loan to any three men by a vote of the full board.

The whole loss for which judgment was given in this action was on these three items and amounted to $166,919.

If the president assented to these loans, then under section 5239, he is liable for this loss in his individual and personal capacity.

Thompson and Wilson are not charged as having assented to this violation of the statute.

Defendant Thomas, however, received warnings, and had personal knowledge of what was going on months before the crash. (See Findings, marg. pp. 80 to 85.)

As the cashier was, under the by-laws, in all things subject to the president, without power to make loans or discounts save with his concurrence, the president must be held to have participated in and assented to each and every one of these excessive loans, and violations of the statute by permitting the cashier to make them.

His attention was especially called to the report of the auditing committee in July and Aug., '88 (p. 80).

The papers in his hands showed all this time and on till the failure, the growing indebtedness of these three men. (p. 85).

No man can shut his eyes to the acts of a person who is acting and empowered to act solely with his concurrence, and thereafter say I did not concur. In such case silence shows assent, if it does not give consent.

Brown's Case, 8 L. R. Eq. P. 404.

If the president knew (as he must have known) of these loans, he consented to them. The findings are that he had the means of knowledge before his eyes. He should

have brought suit, if necessary, to prevent them. Not doing so he is liable for the loss.

Thompson's Liability of Officers, 351-356 (note).

Percy v. Millaudon, 10 Mart. (La.) 68 (8 N. S.)

Cited Wharton, 510.

3.

It was not necessary to bring an action under the section referred to (5239) to forfeit the bank's charter before the individual liability created by this statute attaches.

Thompson on Corporations, sec. 4303.

"The object of this provision of the Currency Act was "to guard national banks from the hazard of loaning "money in improvident amounts upon speculative and "accommodation paper," though it contemplated and permitted to an unlimited amount the discount of paper used and required in facilitating the transfer of property and money in the transaction of the legitimate "business of the country."

Second N. B. v. Burt, 93 N. Y. 233.

If in this or any action the facts show a case within the terms of this section, to-wit, a violation of any of the provisions of the title relating to national banks, and an assent thereto by any of the directors, such director defendant is severally and personally liable, and judgment is properly entered against him for all damages suffered or

sustained by the bank or any person in consequencec of such violation.

Wells v. Graves, 41 Fed. Rep. 459.

Thompson Com. on Corps., 4113, 4273-4278.

Stephens v. Overholtz, supra.

Clews v. Bardon, supra.

Such several and personal liability the Supreme Court of the State denied in this cause, declaring that the only cause of action was a joint negligence, actionable as a tort at common law.

The denial of plaintiff's right asserted on behalf of plaintiff in error to recover the whole loss on these three unauthorized loans, and to have a several judgment against defendant in error for this, gives this Court jurisdiction.

This Court would have jurisdiction to examine and review the judgment, even if it should hold later that a suit by the comptroller to forfeit the bank's charter be a perequisite to the enforcement of this individual liability.

Bailey v. Mosher, 63 Fed. Rep. 488 (27 U. S. A. 339.)

Even if the other two transactions are not strictly loans, and therefore not violations of the statute, there is no dispute over the one with Wickam.

The complaint alleges (marg., p. 16) that he, Wickam, "borrowed" large sums of money, aggregating $45,000, of which $35,000 was unsecured and was lost.

Finding 10 (pp. 83-84) is that he was a man of bad repute; that he "borrowed" by connivance with the cashier

$45,000; that the president knew of this, and had been warned against dealing with this man (pp. 80-83-85). This transaction was a total loss to the bank of the whole sum loaned, $45,000. (Marg., p. 84, findings.)

Here is a plain case of a violation of section 5200 and of individual liability, under section 5239, resting on the president. There is perhaps a violation of section 5209, but we do not claim a civil liability under that, as was attempted in Whittemore v. Amoskeag Bank.

Under the facts here set up, plaintiff could and did claim the right under these sections to a several judgment of at least $45,000 against the defendant in error.

This right being denied, this Court has jurisdiction of the whole case.

The particular sections of the statute under which the plaintiff's claim is made need not be specified, or copied into the pleading or other part of the record.

It is sufficient if it appear by necessary intendment that this right to hold director Thomas severally liable for the damages sustained by the corporation by reason of these violations of the federal statute was involved in the decision, and was in effect denied by the State Court.

Bridge proprs. v. Hoboken, 1 Wall, 116.

Kaukanna W. Co. v. Green Bay Co., 142 U. S. 254.

Furman v. Nicoll, 8 Wall, 44.

Crowell v. Randall, 10 Pet. 368.

Armstrong v. Treasuries, 16 Pet. 281.

Beer Co. v. Massachusetts, 97 U. S. 25.
Chicago Co. v. Needles, 113 U. S. 574.
Hickie v. Starkie, 1 Pet. 94.
Murray v. Charleston town, 96 U. S. 442.
Detroit Bay v. Guthard, 114 U. S. 136.
Eureka Lake Co. v. Yuba Co. 116 U. S. 410.
Arrowsmith v. Hamoning, 118 U. S. 194.
Murdock v. Memphis, 20 Wall. 636.
Minnesota v. Batchelder, 1 Wall. 109.
Dooley v. Smith, 13 Wall. 604.
Legal Tender Cases, 110 U. S. 438.
Davis v. Packard, 6 Pet. 4.
Woodruff v. Mississippi, 162 U. S. 292, 298.

We submit that this court has jurisdiction; that the decision of the Supreme Court of the State of California, reversing such several judgment against director Thomas, and awarding him a judgment against plaintiff and the bank, declaring all liability in or upon him, under the facts pleaded and proven, at an end, was an error for which this Court will reverse that decision and direct that the judgment of the trial court stand.

THIRD POINT.

The action was not simply in form equitable. It was a bill in equity in Cause and Substance as well as in form. Such suits are a well recognized branch of equity jurisdiction: The right to bring such action in equity was a right possessed by the corporation; the fact that this is a bill in equity filed by a stockholder

makes the proceeding a suit in equity and one in which it was error to apply doctrines of retraxit and the like; but the suit is an equitable proceeding for the first reason and would be so if begun by the corporation itself without the intervention of the stockholder as plaintiff.

Though brought under the code system the old rules of equity jurisprudence determine the character of the action.

"The new process was not intended to affect and does "not affect the differences which have heretofore ex- "isted and still exist between the separate departments "of 'law and equity'; it is not intended to affect and does "not affect settled principles, doctrines and rules of "equity." Pomeroy's Eq. Jur., 84, 354.

The Supreme Court in California has jurisdiction in Equity and entertains all suits formerly sanctioned by the English High Court of Chancery. The differences between legal and equitable causes of action are still maintained.

Dewitt v. Hayes, 2 Cal. 468.
Smith v. Rowe, 4 Cal. 6.
People v. Davidson, 30 Cal. 379.
Willis v. Farley, 24 Cal. 490.
Smith v. Smith, 88 Cal. 572.
Rosenberg v. Frank, 58 Cal. 387.
Wickersham v. Crittenden, 106 Cal. 327-8.
Peters v. Delaplaine, 49 N. Y. 37.
Stevens v. Mayor, 84 N. Y. 296.

Moore v. Copp, Decided Dec. 27, 1897, Supreme Ct. California.

"If the facts stated show that the primary rights or "cause of action, or the remedy to be obtained are equit- "able, then the action itself is equitable, governed by "doctrines of equity jurisprudence, and falling within the "equity jurisdiction of this court." (Pomeroy, 354.)

Empire St. B. v. Beard, 88 N. Y. 189-191; citing 49 N. Y. 37; 84 ib. 96.

The language of the opinion of the State Supreme Court in the case at bar is an admission that this proceeding is equitable, being brought by a stockholder; but the Court say:

"This action, while in form pertaining to equity, is in "its cause and substance a legal action to recover dam- "ages for tort against the three defendants, pleaded as "joint tort-feasors."

And the Court proceed to quote from Morawetz on Corporations (sec. 271), that a suit of this character is governed by legal, not equitable rules; and thereafter to apply doctrines of misjoinder, retraxit, variance and release of joint debtors or tort-feasors, never applied or sanctioned by any court of equity.

The text of the author is not borne out by the authority he cites in support of his doctrine, if it be taken to have the meaning and force given it in the application hereto made. We admit that equity follows the law in purely legal or statutory matters, such as limitations,

succession, heirship and the like; but we cannot admit that a court of equity follows the law in its antiquated rules drawn from and depending on the effect of seals, etc., etc., or the special common law rules of practice, depending on the form of the declaration, plea, or other proceeding. These are exactly what equity sought to remedy and the codes sought to abolish.

1 Pomeroy's Equity, Sec. 427.

Thompson's Liability of Officers, p. 354.

The single decision cited by the author (Morawetz) to support this doctrine of the text, is an entirely different proceeding from that mentioned in the text and from that in the case at bar.

The only case he cites is

Pierson v. McCurdy, 33 Hun. 520.

This was a suit by a receiver appointed to manage the affairs of a corporation.

It was there held that the fact that the proceeding was brought by such receiver did not prevent the application of the limitations laid down in the statute for legal as distinguished from equitable causes of action.

No one will dispute that doctrine; but that does not warrant a court in holding that a bill in equity filed by a stockholder is in effect but a proceeding at law subject to technical common-law rules of practice, including variance, misjoinder of parties and causes of action, to be classed as ex contractu or ex delictu as if it were a de-

claration at common law—one in which a joint judgment or no judgment at all must imperatively be entered holding all equally liable, or releasing all; a suit in which the court, though possessing full equity and statutory authority so to do, cannot permit a dismissal as to one—without entitling all defendants to a release and dismissal.

The doctrine thus deduced from the language of the text is almost preposterous. It is certainly not warranted by the authority of the text-writer or the decisions cited by the author.

The text is further open to doubt as a correct statement of principle.

The author in his own note refers to another case in the same State, where such a suit is held to be an equitable proceeding in all respects. No comment is made, but the reference shows that there are limitations on the doctrine as stated in the text; that the author himself had doubts of the correctness of the statement in the text; at least that all authorities do not agree with his view.

The case cited is

> Brinkerhoff v. Bostwick, 88 N. Y. 52, 99 N. Y. 193, and 105 N. Y. 572.

This case is of high authority; it is cited as such in almost every later opinion touching the questions involved; distinguishes the case of Hun v. Cary, cited by Hon Justice Henshaw in support of his decision now under review, and distinctly decides that a proceeding such as this at bar is a suit in equity.

There is one later case in point in New York on this head. We refer to

O'Brien v. Fitzgerald, 143 N. Y. 377.

In that case the Court undertake to show that Hun v. Cary is not overruled, and to reconcile these two cases last mentioned; but it is admitted there that Brinkerhoff v. Bostwick was without a doubt a case of a bill in equity as it had been held.

We contend that the case at bar is essentially equitable in all its features; that it is a "bill in equity for an accounting," as it is entitled. Such action in California is equitable.

Wickersham v. Crittenden, 106 Cal. 327.
Fox v. Hale & Norcross, 108 Cal. 475-478.

The action is against three different directors and officers, "trustees" and confidential agents of a corporation. It sets forth their various duties under the bank's by-laws. It gives as far as plaintiff is able a history of a course of dealings with the funds of the bank which constitute breaches of the trust imposed on defendants.

It is filed by one stockholder, not simply on behalf of the corporation, but as a representative of all stockholders who may desire to come in. The trial necessitated an examination of all books and papers and accounts of the bank; and for that purpose a reference became necessary and was ordered. A discovery was necessary, for the

facts were peculiarly within the knowledge of the delinquent officers, who were still directors, responsible to and in control of the bank (Robinson v. Hall, 25 U. S. App. 56) subject only to the receivership.

It was against three officers and directors. One, the president, was a mandatary receiving a salary, as well as trustee and member of the executive committee of the directors. Being under different degrees of responsibility, having different duties and rights, they might well be held liable in equity in different amounts.

Fox v. Hale & Norcross, supra.

Sayles v. Cent. Bk. of Rome, 41 N. Y. Sup. 1063 (on authority of Brinkerhoff v. Bostwick, 105 N. Y. 571.)

Ackerman v. Halsey, 37 N. J. Eq. 356.

Empire St. B. v. Beard, 88 N. Y. Supreme Ct. 192.

Land Cr. etc. Co. v. Fermoy, L. R. 5 Ch. 763.

A great number of transactions are set up in the bill as grounds for relief. There is not a cause of action such as a jury could try, as in Hun v. Cary, where but one transaction resulting in loss was alleged, a purchase of land which swamped the bank. Here a course of dealing covering a long period of time, is alleged as to many and proven as to at least three customers. The avoidance of a multiplicity of suits in such case gives equity jurisdiction.

Empire S. B. v. Beard, 88 N. Y. Sup. Ct. 191.

The last six months of the bank's life, and much of the time before that was necessarily examined into at the trial.

One other special ground for equitable jurisdiction is shown in the inequalities resulting from the assessment of $37.50 per share levied by the comptroller. All the stockholders save defendant in error paid this in full. He still owes $20,000.00 on his shares of stock. This assessment is alleged as one of the results of defendants' acts and omissions, an element in the damages, one of the losses of the bank and its stockholders.

Such assessment cannot be enforced after payment of the debts of the bank, which have been all paid. (See record in case 276).

The comptroller can enforce the individual liability of stockholders only so far as it is necessary to pay debts. (5234 R. S.)

Any money therefore recovered in this case should go to reimburse the stockholders who have paid a greater proportion of the assessment. A court of equity has power to adminster upon a fund recovered as was the fund in this case, where a court of law could not remedy such inequalities.

Fox v. Hale & Norcross, 108 Cal. 475.

Kennedy v. Gibson, 8 Wall. 503.

Thompson on Corporations, 4560.

The authorities with hardly any dissent agree that suits such as this against directors of a corporation to compel them to disclose what

they have done in the course of their employment, to give an account of their stewardship, and to make good losses due to their neglect of duty or fraud are peculiarly within the jurisdiction of a court of equity.

Pomeroy's Equity Jur. Vol. III, sec. 1088-1090, p. 4 (n. 1.).

This applies to suits brought by the corporation itself directly against its directors as well as to stockholders' suits.

Robinson v. Hall, 25 U. S. App. 480.

Trustees v. Bossieux, 3 F. R. 830, citing a host of authorities on the point; Ackerman v. Halsey, 37 N. J. Eq. 356; Wilkinson v. Dodd, 40 N.J. Eq. 142; Williams v. McKay, 40 N.J. 198; Williams v. Mc Donald, 42 N. J. 396; Brinkerhoff v. Bostwick, 88 N. Y. 58-9-105 N. Y. 571; Hand v. Atlantic Bank, 55 How. Pr. 231; Leeds Estate v. Shepherd, L. R. 36 Ch. Div. 787-88; Concha v. Marietta, 40 Ch. Div. 553; Stephens v. Overholtz, 43 F. R. 465; Neal v. Hill, 16 Cal. 146; Landis v. S. I. C. H. Co. 31 Atl. Rep. Rep. 755; Thompson on Liability of Officers of Corporations, 351-356 (n); 3 Pomeroy Eq. 1094, 1420, 1421; Lawson's Rights and Remedies, 521; Pratt's Dig. (Nat. Banks) p. 67, 70; Charitable Co. v. Sutton, 2 Atk. 400, 406.

In Briggs v. Spaulding, the leading case on this subject, while the directors there on the special facts of the case were exonerated from liability, the jurisdiction of

equity to entertain the bill was not questioned. (141 U. S. 133).

N. H. B. L. A. v. Childs, 82 Wisc. 475.

Empire St. Bank vs. Beard, 88 N. Y. Supreme Ct. 189.

"It is well settled that where there has been waste or misappli-"cation of the fnnds of a corporation by its officers or agents, "a suit in equity may be brought IN THE NAME OF THE "CORPORATION to compel them to account for such waste, or "misapplication, or breach of trust, and this is so, ALTHOUGH "THERE MAY BE AN ADEQUATE REMEDY AT LAW." (Thompson on Liab. of Officers, p. 377.)

"In courts of equity, which look more to the sense and sub-"stance than to the mere form of things, they (directors) are "viewed as trustees, either of the corporation as an artificial body, "or the aggregate body of shareholders." (Ibid, p. 351).

"It being a conceded doctrine of courts of equity that the di-"rectors of corporations are trustees for the shareholders, it "would seem to follow, as a matter of course, that courts of equity "would entertain a bill brought by a shareholder against di-"rectors for relief on account of frauds and breaches of trust." (Ibid, p. 382; Citizens' Loan Soc. v. Lyon, 29 N. J. Eq. 110; "Forbes v. Whitlock, 3 Edw. Ch. 446).

The action brought by plaintiff is the equitable action of accounting against trustees. (Cook on Stockholders, 701, 741 and notes).

"Where confidence is reposed, or the matters are peculiarly "within the agent's knowledge, the action in equity lies, as "against trustees (including directors). Such suits are peculiarly "of equitable cognizance."

3 Pomeroy Eq., sec. 1421 (1420), p. 472 (n. 4.), p. 473 "(n. 1.); Thompson on Corporations, 4605; Empire "State Bank v. Beard, supra; Makepeace v. Rogers, 11 "Jur. N. S. 215; Hennings v. Pugh, 4 Giff. 456; Mackenzie v. Johnston, 4 Madd. 373; Moxon v. Bright, L. "R. 4 Ch. Div. 292; Southampton Dock Co. v. S. etc. "Board, 11 L. R. Eq. 254; Peabody v. Flint, 6 Allen, 52 "—where it is said: 'As between the company and its "officers it was long since held that they were trustees, "and that a court of equity would hold them respon- "sible for every breach of trust"; Thornton v. Thorn- "ton, 31 Gratt. (Va.) 212; Taylor v. Thompkins, 2 "Heisk. (Tenn.), 89; Hodges v. N. E. S. Co., 1 R. I. "312; Kerr v. Camden S. Co., Cheeves Eq. (S. C.) 189; "Halstead v. Rabb, 8 Porter (Ala) 63; Hale v. Hale, 4 "Humph. (Tenn.) 183; Gibbons v. Anderson, 80 F. R. "345; Brinkerhoff v. Bostwick, 88 N. Y. 52 (99 N. Y. "193), 105 N. Y. 572; Sayles v. Central Bank of Rome, "41 N. Y. Sup. 1063; Robinson v. Smith, 3 Paige, 222; "Horn S. M. Co. v. Ryan, 42 Minn. 196; Citizens L. A. "v. Lyon, 39 N. J. Eq. 110; Ackerman v. Halsey, 37 N. "J. Eq. 356; Williams v. Halliard, 38 N. J. Eq. 373; "Witters v. Sowles, 31 F. R., 1 and 5."

We would respectfully call special attention to the case of Brinkerhoff v. Bostwick, 105 N. Y. 571, and to the remarks of Hon. Justice Peckham in that opinion distinguishing the case of Hun v. Cary.

In Hand v. Atlantic Bank (55 How. Pr. 231) the opinion by Barrett, J., seems to have been written with special reference to this case, and is as follows:

"The complaint, in its general features, is good upon the au- "thority of Robinson v. Smith (3 Paige 222). But one cause of

"action is stated; in substance the gross negligence of the trus-
"tees, resulting in the waste and loss of the corporate assets.
"The assessment upon the stockholders is not averred as a dis-
"tinct cause of action, but as a special element of damage. Pos-
"sibly it may not be cognizable as such in an equity suit of this
"nature, but that is a question for the hearing. Ordinarily the
"corporation should file the bill, but the stockholders may do
"so, where, as here, the corporation is still under control of the
"accused trustees. In the latter case, the corporation is a ne-
"cessary party defendant."

"But in our judgment, the receiver should also have been
"joined, and the court will see that he is brought in before
"final judgment. The trustees are entitled to have all possible
"claims against them settled in the one suit.

"And the presence of the receiver is necessary to a complete
"determination of the controversy."

"The defendant corporation, however, cannot demur upon
"that ground, for the reason that it has no interest in the join-
"der. (Hillman v. Hillman, 14 How. 456; Newbold v. Warrin, 14
"Abb. Pr. 80.)

"There must be judgment overruling the demurrer with costs,
"but with leave to withdraw the demurrer and answer over with-
"in 20 days, upon payment of costs.

"The facts of each case must govern, and if it is doubtful
"whether adequate relief could be obtained at law, equity should
"entertain jurisdiction." (Pomeroy Eq. sec. 1421 (n. 4.)

Another brief and pointed opinion is in Ct. Loan Assn. v. Lyon et al. We give it in full:

"The Chancellor—The bill seeks to fix and enforce the per-
"sonal liabilities of the defendants for their misfeasance as di-
"rectors of the complainants, in lending without security, and
"so in violation of one of the by-laws of the complainants, a
"large sum of money belonging to the complainants which was
"thereby lost. The only point discussed on the argument of

"the demurrer was whether the complainants have not an ade-
"quate and ready remedy at law. If it be conceded that such
"remedy at law exists this Court is not thereby ousted of its
"jurisdiction on the subject, which belongs to its ordinary and
"ancient jurisdiction over trusts.

"Where there has been a waste or misapplication of the funds
"of a corporation by the officers or agents of the corporation, a
"suit in equity may be brought in the name of the company to
"compel them to account for such waste or misapplication or
"breach of trust. (A. & A. on Corp. sec. 312; Atty. Gen. v. Utica
"I. Co., 2 John. Ch. 371-389; Bayless v Orne, Freem. Ch. 161-
"173; Atty. Gen. v. Wilson, 1 Cr. & Ph. 2.) The demurrer will
"be overruled with costs." (29 N. J. Eq. 111.)

Such suit states no cause of action at common law; the facts alleged do not constitute a "tort" actionable at law.

16 Am. & Eng. Ency. of Law, p. 388 (n. 7).

In Trustees v. Bossieux, supra, which was an action precisely similar in the main to this, the Court say:

(831) "In this case, where the losses were not directly
"caused by the negligence of the defendants, but were
"the results of acts of officers, committed in consequence
"of the negligence of the directors (defendants), no action
"at law for tort lies."

If the common-law right of action existed, the corporation has still the right to go into equity, particularly if the facts are complicated accounts, intricate, long, or involved; and in this action plaintiff has in the prayer for equitable relief, as well as in title and the facts pleaded, shown his election to pursue the remedy in equity.

The authorities are overwhelming on the point that equity has jurisdiction of this action, and in this connec-

tion it may be said that if there is any conflict between the New York cases, the case of O'Brien v. Fitzgerald is less in accord with the general consensus of authorities than the hotly contested case of Brinkerhoff v. Bostwick. The latter we submit, states the law correctly on this point.

Where the cause of action is a failure to prevent the acts of others, mere nonfeasance and the law of contracts or torts gives no adequate remedy. (Trustees v. Bossieux). Equity, which will suffer no wrong without a remedy, acting upon the duties imposed by the by-laws, under the statutes of the United States, gives the bank the right to call its trustees to account, and to measure their acts by the standard of the by-laws and laws of the United States.

Plaintiff in error had, under the United States statute, the right to sue in equity. Plaintiff claimed that right for the Bank in this suit under the federal law, by the form of his declaration (or bill) counting on the duties in the by-laws. The judgment of the State Supreme Court in this cause denied plaintiff that right so secured, the facts showing a case within the cognizance of equity.

In this the Court erred, and by that error also, we think, gave this Court jurisdiction.

Be that as it may, this Court, having jurisdiction on other grounds, (by reason of other rights denied), will reverse the judgment of the State Supreme Court herein, for the error in holding the suit to be a mere suit at law, and in applying rules applicable only to common-law actions ex delictu.

If the action is not a legal action, or on a legal cause of action purely to recover damages for a tort cognizable at common law alone, then the release of Thomas could not be, and was not, affected by the dismissals of his co-defendants; and in reversing the judgment of the trial court on this ground, and ordering final judgment in favor of the defendant in error the Supreme Court of the State erred. The doctrine of retraxit here applied is thus characterized by one text-writer: "This is one of those technical and "senseless things which abounded in the old law, and "which has nearly fallen into disuse." (Van Fleet For. Ad., vol. 1, p. 173, ff. secs. 50-51.)

It is peculiarly a doctrine of the common-law courts, and unknown in equity.

A retraxit at common law was attended with peculiar formalities. "A retraxit is ever when the demandant or plaintiff is present in Court." Judgment entered thereon barred any further action against the defendant.

A court of equity recognized no such proceeding; its order or judgment of dismissal was or was not a bar to a future action, according to whether it was considered as on the merits or not. It never had the effect given the dismissals in this cause. It was not a satisfaction.

A court of equity had power always to give judgment for or against one or more defendants, without affecting the case of others before it, to dismiss as to one or all, as it saw fit—to dismiss as to some and retain the suit as to others.

Daniel Ch. Pr. (dis.), 659.

The statute of this State gives this power expressly to the Superior Court in proper cases.

C. C. P. 578: "Judgment may be given for or against one "or more of several plaintiffs, and for or against one or "more of several defendants; and it may, when the justice "of the case requires it, determine the ultimate rights of "the parties on each side, as between themselves."

Sec. 581: "An action may be dismissed, or a judgment "of nonsuit entered by either party upon the written consent of the other."

This cause had been tried and submitted.

The trial court had power to enter up separate judgments against the defendants in different amounts, or to exonerate some and hold others liable on the testimony.

Fox v. Hale & Norcross, 108 Cal. 370-427.

Ackeman v. Halsey, supra.

Sayles v. Central Bank, supra, citing Brinkerhoff v. Bostwick, 105 N. Y. 572.

The proceeding in this case amounted to a recovery in equity in different amounts, and the partial satisfaction of the cause of action. It was distinctly adjudged by the trial court to be a payment, not of the total claim for which defendant in error was held liable (Findings, 15, 16), but "on account" merely.

There is not the slightest evidence in the record to show that it was an accord and satisfaction, or intended as a satisfaction, except pro tanto. It was argued in the State Court "on account of" meant here by reason of or in lieu

or in satisfaction of. But the language of findings 15 and 16 is perfectly clear with or without these words. The total loss is given, the amount paid thereof and the net loss being balance unpaid of the total loss found. There is no ambiguity in the language.

Even at common law, in the time of Charles the Second, Coke, J., held a retraxit of the action in a former suit, as to one of two or more defendants sued in the same action, not to be a release, but only a bar to another action against such defendant. So of a nolle prosequi as to one of two defendants in the same action of trespass.

Robinson's Practice, 182, where "retraxit" is discussed under the head of "plea of res judicata." (See case cited, post, 4th point.)

Archibald's Civil Pr. 1515: A retraxit differed only from a nolle prosequi in being a bar.

That may be admitted, that any further action against the dismissed defendants is barred. To that extent the case of Merritt v. Campbell, cited in the decision below, went and no farther. The dismissal in that case was held to bar another action against the same parties. It was not held to be equal to or amount to an accord and satisfaction, or a satisfaction at all. It was a judgment for defendant, not a release.

So the judges of King Charles' time say: It is not a release, only quasi, by reason of barring another action.

In a court of equity such a question could never arise. Equity looks to the intent, and gives effect to the intent

of the parties, and pays no attention to, but disregards, forms.

This proceeding, then, it being in a court of equity, in fact equitable as well as in form, amounted to just what the trial court adjudged, a partial payment, to that extent relieving defendant in error from a liability which, but for such part payment would have been entered up as a judgment against him in the full amount.

Equity looks to the intent. The intent of the parties to this transaction is plain. The decision ignores that—is directly contrary to the intent of all parties, the trial court included. There is no virtue in the word "retraxit" that makes it, even at common law, a release or satisfaction. It is not, and never was, fully equivalent to that even in ancient common law courts.

The spectacle of a modern court having both equitable and common-law powers rejecting the former and insisting that it must be bound by the latter, is a distinct failure of the codes of practice to effect the reforms they were intended to bring about.

We submit the dismissals amounted to a bar, if that is what is meant by a "retraxit," they did not amount to a complete release; they could not in equity be equal to an accord and satisfaction, if that is the meaning of retraxit.

Whatever the meaning of the word as here used, the steps taken in this case to dismiss Thompson and Wilson did not effect a satisfaction or release of the claim as against Thomas.

A breach of trust is not a tort in equity; it gives rise to a debt; and a suit in equity waives the tort if such there be.

This action is equitable on the authority of Brinkerhoff v. Bostwick, and is one to which none of the common-law doctrines of tort can apply.

It is to recover for breaches of trust. The authorities are almost unanimous that such is its nature. The doctrines, therefore, deduced from the assumed relation of "joint tort feasors" cannot apply or suffice to release defendant in error.

A breach of trust is not a tort, but in equity, whether the trustee profit by it or not it gives rise to an equitable debt.

> Perry on Trusts, 260-843-847, and cases there cited.
> Lewin on Trusts, 205-206-906.

It is not barred or released by the death of the debtor (the trustee). (See cases cited above.) It is enforceable against his estate. (40 N. J. E. L. 142.) It is a simple contract debt or a specialty debt, depending upon the character of the instrument creating the trust. The trust and the contract may be implied, but the rule holds good.

It is a debt within the meaning of the statute quoted above, which prohibits the Court from holding one released by the release of a joint debtor. If the defendants are only jointly liable and must be held equally liable or

not liable at all, still they are not all released, in equity, by release of one or two out of three.

That the judgment in this cause was claimed and given on the equitable or contract theory appears from the claim in the prayer) to interest from the date of the losses which is granted by the trial court in its judgment. (Rec., m. p. 24, 90.)

Equity deals with trust and contractual relations solely, and torts, as such, are not of equitable cognizance. (1 Jaggard, 15.) So, in the case at bar, plaintiff sought to recover on the contractual relations existing, framing his complaint in equity accordingly.

We wish to cite one more decision:

Vance v. Mottley, 92 Tenn. 310.

A suit in equity for negligence and fraud against the estate of a cashier, where it is held (p. 318): "The tort may "be waived and an action for the value maintained "against the wrongdoer or his representative." We have discussed this equitable character of the action at perhaps unnecessary length. But the grave assumption by the State Court that this action is, and must be, in cause and substance, legal and not equitable, seemed to require of us a demonstration to the contrary.

MINOR OBJECTIONS TO THE FORM OF THE PLAINTIFF'S BILL.

In the light of these principles of equity and the authorities cited above, the objections of misjoinder and vari-

ance suggested by the Supreme Court of the State in its judgment as grounds for reversing the judgment of the trial court, and remanding for new trial, become of no moment.

The charge of a common intent, seized upon in the opinion of the Court as stamping the action clearly one in tort, and partaking of the nature of a fraud, is of no consequence in equity. It is but the well-known and time-honored "General Confederacy clause," 372-3 (n), Dan. Ch:

"The general charge of fraudulent combination known "as the general charge of confederacy, is usually inserted "in bills, yet it is treated as mere surplusage."

"The plaintiff is given leave to omit the common confederacy clause." (21st Eq. rule U. S. Supreme Ct., Jany. term, 1842.)

Its insertion in the bill here is but an adherence to old equitable forms, and far from showing defendants guilty of a tort, rather stamps the pleading as one in equity and not a common-law declaration.

The suit being in equity governed by equitable principles, it was proper to unite all three defendants and the bill charges but one cause of action.

Hand v. Atlantic Bank, supra.
Wickersham v. Crittenden, 93 Cal. 17.
Bailey v. Mosher, 63 Fed. Rep. 488. (27 U. S. A. 339.)

We submit the judgment of this Court should reverse that of the Supreme Court of the State, and direct that

of the trial court to stand as the final judgment of the Court herein.

If the suit were in cause and substance a legal action, a mere suit at law, and not one to recover for breach of contract or of trust, but one to recover damages for a pure tort, this Court would still have jurisdiction.

Defendant in error would not be released by the acts of plaintiff or the proceedings in the trial court, and the judgment of the appellate court so deciding should be reversed.

A. First of the Jurisdiction.

In this action plaintiff claimed the right to unite all three defendants, and to dismiss two and hold the third; the right to distinguish between the liability of the different defendants, and to collect more from one than from the others; the right to hold the president personally, individually, and severally liable, and to make him responsible for the whole loss caused by the acts and omissions of the cashier.

Let it be admitted that the loss is due to negligence or tort of defendants, yet the negligence is simply the failure to perform the duties imposed by the by-laws upon the bank's officers.

Such failure may be negligence per se, as in case of a duty imposed by municipal ordinance, contract, and the like.

Buckley v. Gray, 110 Cal. 339.

Armstrong v. Luco, 102 Cal. 272.

McKune v. S. C. V. M. & L. Co., 110 Cal. 480.
Burrows v. Marsh Gas Co., supra.

No definition of negligence is possible. It may be a failure to obey positive instructions, or to perform general duties. (Mechem on Agency, 484, 488.) But since the by-laws create the duties, the rights claimed (always the correlative of the duties imposed) are based upon and claimed under the statute of the United States, giving authority to define that duty.

The acts of July 12, 1882 (22 Stat. 163) and Aug. 13, 1888, (25 Stat. 434-436), do not deprive this court of jurisdiction in such case.

Walker v. Windsor Bk., 56 Fed. Rep. 76-80.
Westervelt v. Mohrenstecken, 40 U. S. App. 230;
Sowles v. Bank, 46 Fed. Rep. 513.

The Act of 1882 read:

"The jurisdiction for suits hereafter brought by or against any "association established under any law providing for national "banking associations, except suits between them and the United "States, or its officers and agents shall be the same as and not "other than the jurisdiction for suits by or against banks not "organized under any law of the United States which do or "might do banking business when such suits may be begun."

This does not interfere with the jurisdiction of this Court to entertain a writ of error to review the decree of a State court wherein a right claimed under federal law is denied.

We will suppose the existence of the Bank, its right to do business or to sue at all were denied, and the cause dismissed because it had not organized properly. In such case the strict language of the statute would never be applied or held to mean that because this Court could not have jurisdiction of such a writ in case of a state Bank—claiming its right to exist under state laws—therefore the writ would not lie in case of a national Bank.

Unless such extreme meaning be given to that act, this Court has jurisdiction by reason of the rights and immunities claimed herein, since every claim the Bank makes is made under and by virtue of the statute. (Osborn v. Bank, 9 Wheaton.)

The case of Ex parte Jones, 164 U. S. 691, and the discussion there applies solely to United States District and Circuit Courts and appeals therefrom.

The Act of Aug. 13, 1888, is as follows:

"Sec. 4.—That all national Banking associations estab-"lished under the laws of the United States, shall for the "purposes of all actions by or against them, real, personal, "or mixed, and all suits in equity, be deemed citizens of "the States in which they are respectively located.

"And in such cases the Circuit and District Courts shall "not have jurisdiction other than such as they would "have in cases between individual citizens of the same "State.

The provisions of this section shall not be held to af-"fect the jurisdiction of the courts of the United States in "cases commenced by the United States, or by direction of

"any officers thereof, or cases for winding up the affairs of "any such Bank."

25 Stat. 436.

This late act is expressly limited to suits brought in the U. S. Circuit or District Courts, by or against such banks, making them citizens of the State for such purposes.

This act repeals the former act of July 12, 1882. (Ex parte Jones, supra.)

Neither act seeks directly to limit the jurisdiction of this Court under sec. 709 of Revised Statutes. An implication or inference in a subsequent statute will not suffice to limit the jurisdiction of a Court given by express statute. Repeal or amendment by implication is not favored.

Rosecrans v. United States, 165 U. S. 257.

United States v. Cook Co., N. B. 2 N. B. C., 128.

The question of diverse citizenship does not enter into the case. It may be admitted that plaintiff in error is a citizen of California without ousting the jurisdiction of this Court.

In Petri v. The Bank, it is said in the opinion by Fuller, C. J.:

"So far as the mere source of its incorporation rendered "suits to which a national bank might be a party cogni- "zable by the Circuit Courts, that was taken away, but the "jurisdiction which those Courts might exercise in such "suits between citizens of different states or under the "constitution or laws of the United States, except in that "respect remained unchanged." (142 U. S. 649.)

In McCormick v. Market Bank, 165 U. S. 538, decided Mar. 1, 1897, per Gray, J., the claim made by a plaintiff that a lease executed by a national bank before the comptroller had authorized it to begin business bound the bank being denied, gives the Court jurisdiction.

In Hussman v. Durham, 165 U. S. 147, where the State Court held the equitable title conveyed by proceedings in the United States land office and tax titles based thereon to be invalid, this Court say it is apparent that a right claimed under the authority of the United States is denied, and this Court has jurisdiction. The same is true in the case at bar.

It is further submitted that we have made out a case under section 5329.

Certainly the right to compel defendant in error to respond individually and to make good out of his private means all the losses of the Bank charged in the bill and found in the decision denied by the State Court, is based upon the Federal statute and claimed thereunder in this action.

Eliminate the opinion of the State Court entirely from the record, and the right so claimed is denied. The sophistry of the opinion cannot destroy its effect as a judgment nor take away the jurisdiction of this Court to review it where it denies rights claimed under Federal law.

We submit that the mere denial of the prayer of a national bank for judgment in any case in a state court of last resort gives this Court jurisdiction to issue a writ of error.

Certainly where rights are claimed by virtue of the by-laws of the bank under sections 5133-5136, Rev. Stat., and denied as in this case, a right to review the decision by writ of error is given by section 709. The case is one arising under the laws of the United States. See quotation (ante) from

Witters v. Foster, 26 Fed. Rep. 737.
Metropolitan Bank v. Claggett, 141 U. S. 520.
McNulta v. Lochridge, ib. 327.

B. Regarding the Dismissals in the Trial Court.

The State Supreme Court failed to distinguish between a release and a satisfaction. The former is not the equivalent of the latter. The latter, when given to one has been held to discharge all parties, to inure to the benefit of all; the former not so, unless it was a sealed release which at common law imparted full and adequate compenstion, to wit, a full satisfaction.

A retraxit was at common law neither a release nor a satisfaction, but a quasi release because it was a bar to a new action. A nolle prosequi might or might not amount to a bar; it was not a satisfaction.

Dennis v. Payne, March 18, 1895.

"The bond being of P. Sr. and P. Jr., and the retraxit "being as to P. Jr., it was argued by Maynard for the de-"fendant that it was a discharge of P. Sr., also for it doth "amount to a release and it is clear a release to one shall "discharge both." Rolls, contrary, "that it goeth only by

"way of estoppel, and not as a release, and therefore shall "not bar." Barkeley, J., "that it amounts to a release and "shall therefore discharge both (7 E. 4).

Hickmot's case in the 9th Rep. (52 b: "The plaintiff shall "not have judgment where he hath no cause of action, and "therefore he shall not have judgment. Further, a re- "traxit is not an estoppel but a bar of the action. Be- "sides, here he hath altered the deed, and it is not joint "as it was before like as when he interlines it or the like; "there the deed is altered by his own act, and therefore the "other shall take advantage of it." Cook J., contrary: "For it is not a release, but a quasi release, and if the ob- "ligee sueth one, and covenanteth that he will not farther "sue him, the same is in the nature of a release, and yet (21 H. S.) there ought to be an actual release, of which "the other shall not take advantage of it. So in this case "because it is but in the nature of an estoppel the other "shall not take advantage of it."

From the report of this case by Croke (S. C. Cro. Car. 551) we quote the following:

"I inclined to that opinion, that it is neither a release "in fact nor in law, but quasi an agreement that he will "no further prosecute; and it may be, the said J. P., Jr., "paid the moiety of the said debt and the obligee agreed "to accept it of him and that he would no further proceed "against him, and being jointly and severally bound, he "might make such an agreement and not discharge the "bond."

Retraxit was equivalent to a general verdict in defend- ant's favor.

Prinner v. Edwards, 6 Rand. 677.

So in Walsh v. Bishop (trespass for battery against two) Croke Car. 239-243:

"The errors insisted on were: First that the jury ought "not to have given several but joint damages; and sec- "ondly, that the entry of a nolle prosequi before judg- "ment is quasi a confession of his action to be false "against one, or a release to him, which being before judg- "ment is, as it were a release to both. But the Court (ab- "sent Jones) conceived that there was not error in either "of them. For first, when the plaintiff hath relinquished "his suit against the one, although in truth there ought to "have been inquisition but once of the damages, and not "severally, yet it is not material when no advantage is "taken thereof; and as to the second, it is not a confession "that this writ is false, nor an absolute release to the one, "but it is, as it were, an agreement that he will not pro- "ceed against the one; and his acknowledgment IS AN "ABSOLUTE BAR AS TO HIM, and proceeding may be "had against the other."

A retraxit at common law was probably as to all defendants in a cause or none. But that is a reason why the proceedings in this cause were not a retraxit. They were dismissals entered as to part only of the defendants. At common law they would have been called "nolle pros." (1 Wms. Serg. 207, n. 3.)

It is this use of common law terms that is misleading. As Prof. Pomeroy says in his book on Remedies: "It produces confusion and confusion alone. It was settled law at an early day that nothing short of full payment or a re-

lease under seal would discharge both of two joint contractors, or trespassers."

7 Robin C. Pr. 513.

Walker v. McCullough, 5 Me. (Gr.) 428, and cases cited.

In this state the effect of seals, the rules applied at common law to sealed instruments are abolished.

S. P. v. Von Schmidt, 50 Pac. Rep.

Tracy v. Alvord, 50 Pac. Rep. 757.

Even at common law a release given one would always be construed into a covenant not to sue so as to give effect if possible to the intent and present a release of the others.

The right to proceed against sureties might always be reserved in a release.

7 Rob. Pr. 514-516-518, and cases cited.

Solly v. Forbes, 6 Eng. C. L. 11; 2 Brod. & Bing. 38.

"Courts of law adopting a rule of construction more "equitable than formerly, look to the intention of the par- "ties, and though in the instrument executed to one the "word 'release' is made use of, they will not let it operate "as an absolute and unconditional release to all when it "is followed by words which show the release to be par- "tial and particular, that is to one only (p. 516.)

The Modern Rule.

"A RELEASE OF ONE JOINT TORT FEASOR DOES NOT RELEASE THE OTHERS," but the injured party is entitled to only one satisfaction. It is immaterial whether the satisfaction is obtained after judgment, or by amicable adjustment, without litigation. The essential thing is the satisfaction.

> Jaggard on Torts, vol, 1, page 344, sec. 177—heading of chapter "release."

Further on, in that chapter, the author states the rule, that a covenant not to sue does not release a joint wrongdoer, citing in the note a case decided in Illinois in 1892, which is on all fours with the case at bar, where the rule is distinctly enunciated that THE DISMISSAL OF A CASE AGAINST ONE OF TWO JOINT TORT FEASORS, TOGETHER WITH THE EXECUTION FOR A VALUABLE CONSIDERATION, OF AN AGREEMENT NOT TO SUE HIM, DOES NOT OPERATE AS A RELEASE OF THE OTHER TORT FEASOR.

There must be an express release amounting to an accord and satisfaction.

> City of Chicago v. Babcock, 143 Ill. 358; 32 N. E. 271.

This was an action on the case to recover damages for personal injuries. Appellee recovered judgment for

$1,500, which was affirmed in the appellate court, and, on appeal taken to the Supreme Court, the point made that plaintiff had originally brought his action against another defendant, but had dismissed against him upon receipt of the sum of $150. The Court there say, on page 366:

"Where there are a number of tort feasors, the party injured may, at his election, sue one or several, or all; and where the suit is against one or some of the wrongdoers, but not against all, the person or persons sued have no right to complain. And so, also, where there is suit against several tort feasors, the dismissal of the suit against one does not bar the action against the others (Knapp v. Roche, 94 N. Y. 329; Sloan v. Herrick, 49 Vt. 327; Bloss v. Plymale, 3 W. Va. 393). A release to one of several joint tort feasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others. Here there is no claim of a technical release under seal. The pending suit against Le Cardi was dismissed, and a written agreement was signed that no action should be begun against Le Cardi by appellee. This, on its face, was simply an agreement or covenant not to sue. The legal effect of such a covenant is not the same as that of a release. A covenant not to sue a sole tort feasor is, to avoid circuity of action, considered in law discharge, and a bar to an action against such tort feasor. But the rule is otherwise where there are two or more tort feasors, and this covenant is with one of them not to sue him. In such case the covenant does not oper-

ate as a release of either the covenantee or the other tort feasor, but the former must resort to his suit for breach of the covenant, and the latter cannot invoke the covenant as a bar to the action against them.

"THE ONLY GROUND, THEN, THAT APPELLANT "HAD TO STAND ON, IN RESPECT TO THIS "BRANCH OF THE CASE, WAS A CLAIM THAT "THERE WAS AN ACCORD AND SATISFACTION, "and that the $150 was paid and received in satisfaction of "the damages sustaned. IF, AS CLAIMED BY APPEL- "LEE, THE $150 WAS PAID AND RECEIVED SIM- "PLY IN CONSIDERATION OF THE AGREEMENT "NOT TO SUE LE CARDI, AND NOT IN SATISFAC- "TION OF THE DAMAGES, BUT ONLY IN PART "PAYMENT OF THE SAME, then the transactions be- "tween appellee and Le Cardi did not amount to an ac- "cord and satisfaction, and were no bar to the suit against "appellant. In fact, it was for the interest of the latter "that appellee should receive part payment of her claim from Le Cardi, and thereby reduce the amount of dam- "ages recoverable from it. The views we have expressed "are sustained by the following authorities: (Snow v. "Chandler, 10 N. H. 92; Knapp v. Roche, 94 N. Y. 329; "Bloss v. Plymale, 3 W. Va. 393; Sloan v. Herrick, 49 Vt. "327; Brown v. Marsh, 7 id. 320; Chamberlain v. Murphy, "41 id. 110; Ellis v. Esson, 50 Wis. 138; Parmlee v. Law- "rence, 44 Ill. 405.)"

In the case at bar there is no dispute as to the fact that the $27,500 was received simply on account of the damages. The opinion so states, and the Court below distinctly so found. (Findings 15 and 16, supra.)

This doctrine, so clearly decided and unmistakably announced in Illinois, has also received the sanction of the highest court in Wisconsin.

See Pogel v. Mailki, 60 Wis. 248.
Ellis v. Esson, 50 Wis. 138.

The first of these cases was decided in 1884, and is brief but to the point, and we quote from the opinion, page 250:

"Where the trespass is joint, this Court has held that the receipt of money from one, with an agreement not to prosecute him, discharges the others only when such money is received as an accord and satisfaction for the whole injury; but, where it is received only as part satisfaction, it discharges the others only pro tanto (Ellis v. Esson, 50 Wis. 138)."

The case of Ellis v. Esson had been decided four years prior, and is a very carefully considered opinion, making the distinction which we ask this Court to make between cases of tort simpliciter, where damages are not strictly matter of proof, and a case where, as in the case at bar, there is a fixed, legal measure of damages, and holding that in such cases a receipt of part of the amount found due the plaintiff could not amount to a satisfaction, whatever may be the rule in the class of cases where there is no fixed measure of damages.

The Court further discussed, at page 146, the old common law rule that a technical release under seal given by the injured party to one of several joint wrongdoers

operated to release all, showing that that rule is based upon the nature of the release under seal, which, being absolute at common law, could not be controlled by parol evidence, and raised a conclusive presumption that it was given in full satisfaction and upon sufficient consideration.

The rule in Vermont is the same, to wit, that in an action against one of several co-trespassers evidence of payments by any one of them, may be received in evidence, for their effect is to diminish the plaintiff's recovery pro tanto, but unless they were received in full satisfaction of the right of action they would not defeat the suit, but would amount to mere evidence in mitigation of damages.

Chamberlain et al. v. Smith, 41 Vt., 110.

The rule obtains in the State of Maine. One of the early cases, where it is announced, is the case of

McCrillis v. Hawes, 38 Maine, 566,

where a settlement made by one of two joint trespassers for half of the property taken was held not to preclude the owner from maintaining an action against the other to recover the balance.

The court of appeals of West Virginia announced the same rule in 1869 in the case of Bloss v. Plymale, 3 W. Va., in the following language quoted from pages 404, 405:

"In the case of Parker v. Lamon, decided in the reign "of James I., Hobart, 70, it was held that a judgment of

"nol pros. as to one or more joint trespassers before judg-
"ment would discharge the action. But in the next reign
"that case was overruled, and the more rational doctrine
"held that a discontinuance as to one defendant was a
"mere agreement to relinquish the action as to him only,
"and he alone could take advantage of it, plaintiff being
"still at liberty to proceed against other defendants (Wash.
"v. Bishop, 3 Croke, 243). Since then the current of au-
"thority has been uniform on the point (Noke v. Ingham,
"1 Wilson, 90; Dale v. Tyre, 306; 3 Term Rep. 511; Cooper
"v. Tiffin). The cases are collected and approved by Wil-
"liams in his work to Salmon v. Smith, 1 Saunders, 202,
"note 2.

"They fully establish the rule that a nolle prosequi dis-
"missal or discontinuance as to one defendant before
"judgment does not enure to the benefit of the others."
"* * *

"It was early held that the absolute release of one joint
"trespasser discharged all the rest who participated in
"the act, and such is still the rule. But the release plead-
"ed as a discharge for all, that has been given to one only,
"must be a technical release, under seal, expressly stating
"the cause of action to be discharged without condition
"or exception (Frink v. Green, 5 Barb.; De Zlug v. Baily,
9 Wend., 336; Rowl v. Stoddard, 7 Johns. 207).

"So strictly are these technicalities adhered to that
"no release is allowed by implication; it must be the im-
"mediate result of the terms of the instruments, which
"contains the stipulation, hence it is that a covenant not
"to sue one joint debtor or trespasser, though it operates
"between immediate parties, does not extend to the oth-
"ers.

"In the case of Lacy v. Kynaston, 1 Lord Raymond, 689, "reported also in 12 Modern, 548, it was held that a cove- "nant not to sue was personal to the covenantee only, and "could not be set up against the other joint parties. And "though such covenant might operate as a release be- "tween the parties to it to avoid circuity of action, yet it "could extend no further (Farrell v. Forest, 2 Saunders, p. "48, note 1)."

In New Hampshire the rule is announced in the following words:

"Nothing short of payment of the damages by one of "two or more joint trespassers or a release under seal will "operate as a discharge of the other trespasser."

Snow v. Chandler, 10 N. H., 92 (syllabus, decided in 1839). The same in Mass.

Shaw v. Pratt, 39 Mass. (22 Pick.), 307.

Three of the cases above cited have received the sanction of the editors of the American Decisions and American Reports, and are now noted in those reports as precedents worthy of preservation, and to an extent leading.

Ellis v. Esson, is found in 36 Am. Rep., 830.

Snow v. Chandler, in 34 Am. Dec., 140.

Bloss v. Plymade, in 100 Am. Dec., 752.

In Alabama, the rule is announced in the following language in

Smith v. Gayle, 58 Alabama, 607:

"If the purpose is to release a part only of a demand "and not the whole, or one only of several jointly liable, "it is released only pro tanto. No other or greater effect "can be given it than the parties intended. A release to "one of several joint contractors, though the creditor "should retain the right to proceed against the others, "would release them, to the extent that they could de- "mand contribution from the associate who is released. "It would have no other operation. The release of Har- "per, and the acceptance from him of three thousand dol- "lars, on account of the use and occupation of the prem- "ises during the period she was deprived of the possession "by the trespass complained of, satisfies the plaintiff's "right of recovery, in this action, to that extent only. A "satisfaction to that extent, it is apparent the parties "contemplated, and so it must operate, or the plaintiff "would obtain a double satisfaction. If any larger oper- "aation was given it, the intention of the parties would "be defeated. Harper stipulated for his own release, not "for the release of the defendants to this suit. It was "partial, not entire, satisfaction he proposed to make, and "the plaintiff agreed to accept. The present defendants "are benefited, not wronged. Contribution from Harper "they could not have compelled, and their liability is les- "sened by the payment he has made and the plaintiff "has accepted. If the release had been intended "to cover the entire cause of action embraced in the com- "plaint, if it had been intended to accept the sum paid, "in full satisfaction, such would be its operation, and all "who participated in the trespass would be discharged. "But it was partial compensation, for the loss of the use "and occupation and the discharge of Harper only that

"was intended, and beyond that it is not available to the "present defendants (Snow v. Chandler, 10 N. H., 62; "Chamberlain v. Murphy, 41 Vt., 110)."

In the case last cited there is a reference to a statute which requires that all instruments, whether sealed or unsealed, must have effect according to the intention of parties to the same. Virtually the same provision is found in our Code abolishing the distinction between sealed and unsealed instruments.

Section 1629, C. C.

Tracey v. Alvord (supra).

S. P. Co, v. Von Schmidt (supra.)

There are other statutes, in California, notably sections 1427, 1428, 1708, 1714 and 1543 of the Civil Code, which have a bearing upon this case. They appear absolutely to abolish the distinction between rights of action resulting from tort and those arising from contract.

Section 1428, C. C., reads, "An obligation arises either from:

"1st—Contract of the parties; or

"2d.—Operation of law."

Sections 1708 and 1714, C. C., expressly include, within the definition of obligations imposed by law, those arising from negligence in particular. The old rule distinguishing torts as a special class of obligations is abolished, and all those upon whom obligations are imposed are debtors within the meaning of the Code.

"Section 1543. A release of one of two or more joint "debtors does not extinguish the obligations of any of "the others, unless they are mere guarantors, nor does it "affect their right to contribution from him."

This alone would seem to be conclusive that Thomas was not released.

But waiving that, the general doctrine is, by all careful writers and courts, recognized to be that a release in whatever form must be given affect according to the intent of the parties.

That a release of one defendant by dismissal and receipt of money, on account of the claim sued upon, is a release pro tanto only against the other defendants; that where there are joint tort feasors the satisfaction of the claim as against one must amount to a payment of the full amount of the claim (that is to an accord and satisfaction) to operate as a release of the others. This is so even in the case of personal torts, and must be so where the damages resulting from the wrong are capable of exact estimate, be the suit in tort or contract.

In addition to the cases cited above the following authorities sustain this doctrine.

West Chic. etc. Co. v. Piper, 165 Ill. 325 (citing Chicago v. Babcock).
Taylor W. Co. v. Dillard, 29 S. W. Rep. 662.
Mer. N. Bank v. McAnnulty, 31 S. W. 1091. Tex.
City of Valparaiso v. Moffit, 12 Ind. App. 250.
Mathews v. Chicopee, 3 Robt. (N. Y.), 713.

Woods v. Pangburn, 75 N. Y. 495.

Arnett v. U. P. R. R., 2 Mo. App. Reporter 971. (vide.)

San Antonio v. Mackay, 3 S. W. 760 (Tex. C. A.)

Couch v. Mills, 21 Wend. 424.

Solly v. Forbes, 2 Brod. & Bing. 38.

Ford v. Beech, 11 Q. B. 852.

Bank of Catskill v. Messenger, 9 Cow. 37.

Line v. Nelson, 38 N. J. L. 358.

Fitzgerald v. Smith, 1 Ind. 310.

Lumley v. Wabash R. R. (C. C. A.) 76 F. 66.

Lovejoy v. Murray, 3 Wall. (70 U. S.) 1 and 17.

Dawson v. Schloss, 93 Cal. 194-199.

Jaggard on Torts, 117.

Cooley on Torts, 2d ed., 139, note 1.

Am. and Eng. Ency., Vol. 20, Title Release, p. 766.

Irvine v. Milbank, 56 N. Y. 635 (s. c. 15 Alb. Pr. N. S. 358.) (Ct. of Appeals per Folger, J.) (Superior Ct. 14 Abb. Pr. N. S. 408; s. c 4 J & S. 264.)

We quote from a well known text book the following:

"A part payment on a claim for damages by one co-"trespasser enures to the benefit of all, and being less "than the damages, if not understood to be in full satis-"faction, releases the other joint trespasser only pro "tanto."

"The parol release of one joint tort feasor is not the dis-"charge of the others, unless the debt be fully satisfied. "If in such case the apparent intention is not to release

"or discharge the debt, but to release only the one from "liability, the courts usually hold the agreement to be a "covenant, not to sue that one and permit the plaintiff to "proceed against the others."

20 Am. and Eng. Ency., 766.

The California Cases Uphold Our Position,

In the case of Urton v. Price, cited by the State Supreme Court, the jury found a special verdict, and among other facts found were these, in the language of the verdict:

"The plaintiff received satisfaction for the injury al- "leged in the complaint from the defendant Mechanics' "Institute. . . . . The plaintiff received damages in the "sum of $500."

On such a findng it is hard to see how the case could have been decided in any other way. But in the case at bar, there is no such finding nor any evidence that would warrant any such finding.

In the case of Tompkins v. Clay Street Railroad, the trial court refused to instruct the jury

"That if plaintiff had received compensation from one defendant, their verdict must be for the defendant."

The only note of criticism possible in comment on that case is, that the word "compensation" is confused with the word "satisfaction." For if one is the equivalent of the other (and the words appear to be so used), then it was error to refuse such instruction, and the case was prop

erly decided. But such a case is readily distinguishable from the plaintiff's case, wherein he sues for certain well ascertained, clearcut pecuniary losses. Not one loan, but several. Not occurring at one particular time, but running through a long course of many months, and being connected with each other in no way except by the fact that the defendants in their official positions failing to exercise proper supervision were culpable and negligent in not preventing such loans. This is the only link by which these different, several, separate, and distinct so-called torts are united in this action.

And all that Thompson and Wilson undertook to do was to make good a part of these losses, to pay some two or three of these items of the account.

For such wrong as was suffered by the plaintiff in error in whatever form or forum the remedy is enforced, the result being a judgment for a sum certain and interest, and the only bar to the right of action where there are joint tort feasors or joint debtors arising from a satisfaction of the cause of action, such satisfaction to release all parties must be a full and not a partial satisfaction.

In this connection we would refer to the case of Dawson v. Schloss, 93 Cal. 194, 199, where a judgment against two defendants was reversed as to one, and upon a retrial a less judgment given against the party who had appealed, the other judgment remaining untouched and unsatisfied. In the opinion the cases of Urton v. Price and Thompkins v. Clay Street Railroad are distinguished, and the reason of the rule given, the statement being made

that the vital point is the satisfaction without which there can be no release of a joint wrongdoer.

In Nichols v. Dunphy, 58 Cal. 605 (as in Dawson v. Schloss) a judgment was reversed as to one joint tort feasor and affirmed as to another and on retrial a second judgment in the same action recovered against the party who had appealed.

This was going a step further than the rule adopted in the common law courts. See Sedgwick on Damages, vol. 3, p. 1286, from which we quote:

"In many cases of joint trespass and several damages "given, the plaintiff is permitted to enter one joint judg- "ment against all, assuming the largest sum assessed "against any one is the damages against all de meliori- "bus damnis. So where a joint tort has been committed "and the referee found that the plaintiff had been dam- "aged by one of the defendants to the amount of $600, and "by the other to the amount of $150, it was held by the "Superior Court of New York that the judgment was "rightly entered against both in the larger amount, or "the error may be cured by entering a nolle pros. against "all but one and taking judgment against him only."

The practice adopted here was similar to this. This practice follows our statute, section 578, 579, C. C. P., and is sanctioned by the Supreme Court of the United States in Lovejoy v. Murray, supra.

The opinion written by Hon. Justice Henshaw in the case at bar cites Merritt v. Campbell, 47 Cal. 542, to the

effect that the dismissal here entered amounted to a retraxit, and argues from that that it was a release and a discharge of all three defendants.

There are several answers to this:

First.—That was a case where a single defendant pleaded a dismissal in bar. The differences between a retraxit and a nolle pros. which control this case (as a case at law) were absolutely immaterial there. The case is not authority therefore on the points cited.

Second.—The dismissal given in this cause was not the sace as that in case cited. The concurring opinion of Justice Crockett on rehearing, in that very case makes the distinction between dismissals under the statute (581, C. C. P.), and one made, as in that case, upon the oral agreement of the parties in open court.

Third.—The correctness of that ruling has been doubted as recently as case of Pierce v. Hilton, 102 Cal. 276, 277, and in Landregan v. Peppin, 94 Cal. 465-470, where the Court say they are not disposed to extend the doctrine of that case.

Fourth.—All that Merritt v. Campbell decides (if it has not been overruled) is that "such judgment (as was there "rendered), if properly pleaded, will consctitute a defense "to another claim (or suit), afterwards brought upon the "same cause of action." (Landregan v. Peppin, supra, p. 470).

This is not saying that such judgment is a release, and very far from the doctrine that such dismissal and judgment amounts to a satisfaction.

The word "retraxit" is used in the opinion in that case, but no such meaning was there attached to it as the Court in this cause give it. (See 104 Cal. 669.)

Fifth.—Except as affecting the question whether or not the dismissal is a bar to another action, the case of Merritt v. Campbell and the definitions and doctrines of retraxit and nol pros are unimportant.

Sixth.—The dismissal and judgment are a release only by operation of the doctrine of res judicata. See cases cited supra, and

Wohlford v. Compton, 79 Va. 338; 21 Am. & Eng. Ency. Law, 297-299.

Beecher's Case, 8 Coke Rep. 58.

Stoutenborough v. Board of Edu., 104 Cal. 664.

Van Vleet's Former Adjudication, Vol. 1, p. 173 ff, secs. 50, 51, 581, 582, C. C. P.

Halleck v. Loft, 19 Colo. 74.

Seventh.—The judgment in Merritt v. Campbell was expressly held to be no release, nor akin to a release or a satisfaction, but to be a judgment on the merits in favor of defendants, and the decision is based on the statutes of the state. See opinion rendered on rehearing, from which we quote:

"Sec. 149, Practice Act, provides that in every case other than "those mentioned in the last section, the judgment shall be ren- "dered on the merits."

"This judgment, therefore, was not rendered in accordance "with any of the provisions of section 148, but upon the oral "agreement of the parties in open court, and with a stipulation 'that the defendant would pay certain costs, must be deemed "to be a judgment against plaintiff on the merits, rendered by "consent of parties."

Merritt v. Campbell, 47 Cal. 543-548.

A judgment on the merits under the Code in favor of one defendant would not affect the others, there being no satisfaction of the claim.

The vital question in all cases must be, where there is a consideration for the dismissal or judgment in favor of defendants, Was there a satisfaction of the claims? (Jaggard, sec. cited.)

Without that a judgment on the merits against the plaintiff in suit against one is not a bar as against another defendant in the same or in separate suits.

The satisfaction is the essential thing.

Here the trial court finds there was none, that the payment was made and received as a partial payment merely on account of the total claim in suit.

The opinion in the case at bar would make a dismissal operate as a satisfaction whether so intended or not. This was the error into which the court fell.

From an opinion by Judge Story (Minor v. Mechanics' Bank, 1 Peters, 44)we quote the following (p. 74):

"The nature and effect of a nolle prosequi was not well "defined or understood in early times; and the older au- "thorities involve contradictory conclusions. In some "cases it was considered in the nature of a retraxit, ope- "rating as a full release and discharge of the action, and "of course as a bar to to any further suit. In other cases "it was held not to amount to a retraxit, but simply to an "agreement not to proceed further in that suit, as to that "particular person or cause of action to which it was ap- "plied. And this latter doctrine has been constantly ad- "hered to in modern times and constitutes the received "law."

"In cases of tort against several defendants, though "they all join in the same plea, and are found jointly "guilty, yet the plaintiff may, after verdict, enter a nolle "prosequi as to some of them and take judgment against "the rest."

"The authorities, and particularly the American, pro- "ceed upon the ground that the question is matter of "practice, to be decided upon considerations of policy and "convenience, rather than matter of absolute principle; "and that therefore this Court is left at full liberty to en- "tertain such a decision as its own notions of general con- "venience, and legal analogies would lead it to adopt. "We are of opinion that where defendants sever in their "pleadings, a nolle prosequi ought to be allowed. It is a "practice which violates no rules of pleading, and will "generally subserve the public convenience. In the ad-

"ministration of justice, matter of form, not absolutely "subjected to authority, may well yield to the substantial "purposes of justice."

In an action against several, a dismissal may be entered against one and the action proceed against the others:

United States v. Leffler, 11 Pet. 86.
Griffin v. Reynolds, 17 How. 612.
Barry v. Foyles, 1 Pet. 311.
Minor v. Mec. Bank.

In case of suits for damages for torts, nothing short of recovery of a judgment against one for the injury *and a satisfaction* of that judgment will bar an action against the others:

Sessions v. Johnson, 95 U. S. 349.
Birdsell v. Shaloil, 115 U. S. 489.
Lovejoy v. Murray.
(See also Planters v. Union Bank, 16 Wall. 497.)

THE DECISIONS OF THIS COURT ARE TO THE SAME EFFECT. THE RULE IS ONE OF GENERAL LAW.

We quote first from pages 10 and 11 of 70 U. S.. (Case of Lovejoy v. Murray.)

"Two propositions seem to be conceded by all the au- "thorities which bear with more or less force on the main "question, and which may as well be said here: That all "persons engaged in committing the same trespass are "joint and several trespassers, but not joint trespassers

"exclusively, and like persons liable on a joint and several "contract, may be all sued in one action; or one may be "sued alone and cannot plead the non-joinder of "the others in abatement, and so far as the doctrine of "several ability carried, that the defendants, where more "than one was sued in the same action, may enter separ- "ate pleas, and the jury may find several verdicts, and on "several verdicts of guilty may assess different sums as "damages."

Recent decisions of many courts affirm the rule.

A very recent authority is Taylor v. Dillard, in the Court of Civil Appeals of Texas, reported in 29 S. W., 662 and 9 Tex. C. A. 669. We quote from the syllabus.

"Where one sues joint tort feasors jointly he may, after "introducing his testimony, waive his right to recover "against one of defendants.

"Action by Henry Dillard against the city of Taylor to "recover for personal injuries. A cross action was insti- "tuted by defendant against Taylor Water Company. "From a judgment for plaintiff against defendant water "company but in favor of defendant city, the water com- "pany appeals. Affirmed."

The court there say with reference to this point:

"There is no merit in the contention that, because the "court found that the city of Taylor and the water com- "pany were jointly liable, a separate judgment could not "be rendered against the latter. It is not necessary to "cite authorities in support of the proposition that joint "tort feasors may be sued separately or jointly, at the

"pleasure of the injured party. The plaintiff in open "court, after introducing his testimony, waived his right "to recover against the city of Taylor, and, therefore, not- "withstanding the court's finding that the facts showed "it to be liable, the court correctly rendered judgment in "favor of the city of Taylor."

The first case we have cited on this head (Chicago v. Babcock) has been lately approved by the highest court in Illinois (West Chicago, etc. Co. v. Piper), where the doctrine is clearly stated that a dismissal of a pending suit against one defendant for a consideration is not a release nor equivalent to a release of the other (165 Ill. 325).

We have suggested a distinction between causes where damages are divisible or severable, or capable of exact proof so that a partial satisfaction is possible, where a mere receipt of money amounts to simply a payment on account, and those where the amount must rest in the sound discretion of the jury. Here they are capable of exact proof. It is a mere matter of accounting, and of the various items in that account the record is silent. The payment made by Wilson and Thompson undoubtedly paid some of these and left the balance of the items unpaid. This distinction is made in the cases, and is based on sound reason.

Ellis v. Esson, 36 Am. Rep. 830.

Lumley v. Wabash R. R. (C. C. A.), 76 F. R. 66 (and cases cited).

We submit that if plaintiff had the power to satisfy the claim of the corporation, he did not do so; he did not release or exonerate defendant in error by the dismissals in the record, he merely consented to the payment by two defendants of part of the whole claim or cause of action asserted. There was no satisfaction. There was no release.

SIXTH POINT.

Plaintiff, a stockholder merely, had no power to release or satisfy the claim of the corporation.

POWER OF PLAINTIFF TO GIVE A RELEASE.

He sued in a representative capacity, and as plaintiff had no power to accept in satisfaction anything less than the full amount of the judgment which the Court awarded. The doctrine is elementary and is laid down in Daniel's Chancery Practice, Val. 1, 244-794 and 795, that

"After decree (or decretal order) the defendant cannot "by his conduct deprive other persons of the same class "of the benefit of the decree if they think fit to prosecute ".t." Citing a number of cases.

"After a decree has been made of such a kind that other persons, besides the parties on the record, are interested in the prosecution of it, neither the plaintiff nor defendant, on the consent of the other, can obtain an order for the dismissal of the bill. Thus, where a plaintiff sues

on behalf of himself and all other persons of the same class; although he acts upon his mere motion, and retains the absolute dominion of the suit until the decree, he cannot by his conduct deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it. 'The reason of the distinction is, that, before decree, no other person of the class is bound to rely upon the diligence of him who first instituted his suit, but may file a bill of his own; and that, after a decree, no second suit is permitted' " (1 Daniel, 794-5).

By decree as used in this extract is meant the announcement of a decree or decretal order (ib. 793-4). After that no dismissal will be allowed as of course, all parties being interested in the matter after that time.

In the case at bar, such order had been made, and decree announced. From that time forth, therefore, the plaintiff's absolute control of the suit ceased. He could not dismiss without consent of parties and order of the Court, nor could he satisfy the judgment obtained without receiving the full amount.

The judgment obtained and entered was in favor of and for the benefit of the California National Bank, of San Francisco. No portion of it went to plaintiff nor inured to his benefit, except indirectly and through the medium of the corporation whose rights he sought to enforce.

The suit is for the benefit of the corporation and decree in but one such suit is permitted.

Beach Mod. Eq. Pr. 66.
1 Dan. Ch. Pr. 191-794, n. 3.
Thompson on Corporations, 4566-4605.
Morawetz on Corporations, sec. 256.

Plaintiff is not even entitled to the custody of that fund paid into court, or any portion of it, without consent of the corporation, or the stockholders interested. The corporation, unless some equitable reason prevents, can go in and collect what his labors, money and perseverance have recovered for it, subject only to his right to such reasonable and proper allowances for his fees, costs and expenses, including counsel fees, as the Court by law may see fit to make, and to the right of the Court to distribute the fund directly among the stockholders if necessary to do complete justice.

Wickersham v. Crittenden, 93 Cal. 17.
Fox v. Hale & Norcross, 108 Cal. 475.
Chetwood v. Bank, Stateler appellant, 113 Cal. 649.

In the case last cited the Court ordered this very fund of $27,500 turned over to Mr. Stateler, representing the corporation under appointment by the Controller, after making allowance to Chetwood for his costs. If Chetwood is not entitled to receive the money, even temporarily, it is difficult to see how he can be held to have satisfied the judgment, even if fully paid, and certainly he could not accept part payment as full satisfaction.

The case is not distinguishable from the case of co-plaintiffs, and it has been distinctly held that one of two

co-plaintiffs cannot satisfy a judgment except upon receipt of the whole amount recovered.

Haggin v. Clark, 61 Cal. 1.

It is analogous to the case of satisfacton by an attorney-at-law, which of course can be entered only on receipt of the full amount.

Section 283, C. C. P. Cal., Sub. 2, and note to Deering's edn.

Weeks on Attorneys, page 218.

Freeman on Judgments, 463.

At common law the rule with reference to release by nominal parties was that the Court would interfere to prevent defendants pleading a release, if it be shown that the release was executed by persons who were suing as mere trustees, having no real interest in the subject matter.

A judgment of dismissal by a nominal plaintiff pleaded in a replication to a plea of retraxit, held the replication was good, as the facts show that such dismissal could not amount to a retraxit.

Rawstorne v. Gandell, 15 M. & W. 307.

Welch v. Mandeville, 1 Wheat. 233.

7 Robinson C. P. 525-904.

The courts of common law exercised a sort of equitable power in their treatment of releases and dismissals by nominal parties. But by the decision n the case at bar

the courts under the Codes have less power than the courts of common law to prevent frauds or a plain violation of the intent of the parties.

Here the plaintiff is held to have possessed a power he never thought of exercising; to have effected a settlement and release that no one contemplated or intended, to have possessed, and unwittingly wielded the powers belonging to the whole Board of Directors. Yet he is but a mere stockholder, with no delegated powers whatever. He could not satisfy the claim any more than he could have sold and assigned it.

It is not the ordinary case of one suing for many.

The order of the Court gave the corporation as well as the other stockholders rights that Mr. Chetwood could not, if he had wished, have forfeited.

The trial court having considered that the losses of the bank caused by defendant in error amounted to $166,000, no one without consent or authority from the bank could release that claim. Without special authority even the bank's officers could not compromise it.

Indeed if the Court's order for judgment was, as the appellate court assume, equal to a judgment, a release by the bank of one or all on part payment of the amount due would have been without consideration and void at common law.

Fitzgerald v. Smith, 1 Ind. 310.

And after this order the cause of action was no longer plaintiff's. He could not release, retract or renounce it, nor satisfy it himself, not even on payment to him of the whole amount.

Had the trial court, on the finding of facts in the record, drawn the conclusions deduced by the appellate court, and entered judgment accordingly exonerating Thomas, we submit such judgment would have been not simply erroneous, but void for want of power in the Court to enter it. It certainly was error in the appellate court to order such judgment not pursuant to but in violation of the stipulation of parties.

It is to be noted that the Court does not, in its opinion, distinguish between the claim of plaintiff and that of the bank. The recital is that the plaintiff has released his claim. But the judgment is that a recovery in favor of the corporation be vacated and the defendant in error wholly exonerated and discharged from any claims of the corporation.

The tort there held to be satisfied is the loss suffered by the bank.

The judgment does not go on the theory that the plaintiff has been paid for his individual losses, but because the whole damage suffered by the bank has been the subject of an accord and satisfaction, and a release a retraxit as it is termed.

This is the vital point in the case.

It is this, that by denying the rights claimed under the

statute gives this court jurisdiction. It is this error in treating the suit as at law, the claim one for a tort, the dismissal as a satisfaction of the bank's claim, that gives the bank the right to sue out this writ of error.

The plaintiff might release his own claims. He did not undertake or attempt to do even this. The Court in holding that he had renounced and retracted, satisfied and released the claims of the corporation—or of the other shareholders—certainly erred.

This is the effect of the decision and for this it should be reversed and the judgment of the trial court left as it was entered.

Recapitulation.

We submit the following as some of the conclusions warranted by the law and the facts of this cause:

1.

That a legal right ("a capacity residing in the plaintiff in error of controlling the acts of the defendant in error") claimed under a statute of the United States, has herein been denied by the final judgment of the Supreme Court of California, giving this Court jurisdiction.

2.

That on any theory of the case, the State Supreme Court erred in deciding that the defendant in error was

released by the acts of plaintiff or by the proceedings in the trial Court. Such ruling not only does violence to the plain intent of all parties, it ignores the statutes of the State. It is contrary to all precedents. It violates fundamental rules of common law as well as of equity.

There was no release in the case. For whatever amount the defendant in error was responsible under the law and the facts at the beginning of the trial, judgment should have been given allowing credit for anything paid thereon

3.

On the general right to a judgment against defendant in error on the facts there can be no dispute. His liability is practically admitted. He made no answer, set up no defense. The defense of Thompson and Wilson is that he is mainly responsible. This the Court found to be the truth. The suit is a proceeding in equity and the decree of the trial Court should stand.

4.

The case being one of equitable cognizance, the conclusion and decree of the trial Court was wholly right on the pleadings and findings. It was error for the appellate court to disturb that decree; and the order of this Court should reverse the judgment of the Supreme Court of California, and reinstate and declare valid the judg-

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ment of the Superior Court of the City and County of San Francisco, wherein the cause was tried.

Respectfully submitted.

San Francisco, December 27, 1897.

E. G. KNAPP,
Counsel for Plaintiffs in Error.

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Counsel for Plaintiffs in Error.

Due service of the within Brief on Behal
Plaintiff in Error is hereby admitted this
day of January, A. D. 1898.

Attorneys for Defendant in Erro

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 275.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, PLAINTIFF IN ERROR,

vs.

RICHARD P. THOMAS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

The concluding portion of the brief of respondent in error is devoted to his theory, which was adopted by the supreme court of California, that this action is one of simple tort. We have tried to demonstrate in our opening brief how utterly untenable that theory is, both on principle and authority. We were not aware till recently, however, of a line of rulings by this court that any objection that a suit is at law and not in equity must be raised before defend-

ants join issue, and that in the appellate court *such objection is entirely too late.*

Reynes *vs.* Dumont, 130 U. S., at p. 395, affirmed in Kilbourn *vs.* Sunderland, 130 *id.*, at p. 514.

(In the latter case, moreover, at bottom of page 514, the superiority of the equitable remedy over the legal one is emphasized in cases of fraud, trust, *fiduciary relations*, and *account.*)*

It thus appears from the above cases, and the prior decisions of this court which they sustain and follow, that the chief point on which the court below rests its decision of reversal, viz., the point that the action is one at common law or in tort, was raised too late, as it appears by the record that this point was never made in the trial court. There the action was by both sides assumed to be just what it was termed—"a bill in equity for an accounting."

This case affords a striking illustration how salutary is the rule that the objection to the form of action must be raised in the trial court; in fact, how essential is the rule to plaintiff's protection. In the trial court plaintiff in error pleaded facts showing an infraction of sections 5200 and 5239, Revised Statutes of the United States, as pointed out at bottom of page 31 *et seq.* of our opening brief. Had the theory of respondent and the supreme court of California, that we were not seeking to enforce any rights conferred by the National Bank act been developed at the trial, we could readily have amended by referring in express terms to sections 5200 and 5239, as well as to section 5136 (4, 5, and 6), of the Revised Statutes as the basis of our right to sue in equity and adopt by-laws imposing on defendants other than mere common-law duties. But we were given no intimation of any doubt by our opponents as to either the

* Moreover, this court has held that the features of case at bar stamp an action *as one in equity.* (Horner *vs.* Henning, 93 U. S., p. 232, affirmed in Stone *vs.* Chisolm, 113 *id.*, p. 309.)

form or nature of our cause of action. We accordingly relied on the general averments that we were incorporated under the Federal statute and adopted by-laws in accordance therewith as sufficient basis for our equitable and statutory rights.

If we were in error on this point, we assuredly had a right to have the pleadings amended and their final nature settled in the trial court, instead of which respondent in error was allowed to keep in reserve his objection to our form of pleading until (after all his other objections had failed) he reached the State supreme court.

(1.) RESPONDENT'S CLAIM THAT COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

Under this head respondent in error claims, at page 9 of his brief, that no *culpable* negligence is shown. He urges that no actual fraud is charged against the defendant or the reckless and utterly irresponsible cashier, and seems to clearly assume that negligence in such cases is not actionable in the absence of actual fraud. It is true we do not plead actual fraud in this case where we rely on negligence. That would be improper (Fox *vs.* Hale & Norcross, 108 Cal., at p. 424, bottom). But we charge very gross negligence, almost amounting to actual fraud, against the cashier (Tr., pp. 6, 7). We also charge what amounts to constructive fraud against the defendants themselves (Tr., bottom p. 5 and top p. 8). In fact these defendants, it is charged, had in effect abdicated. They were mere "figure-heads," coming within the condemning language of this court in Briggs *vs.* Spalding, 141 U. S., at p. 465, bottom. The doctrine that directors of corporations, especially bank corporations, are liable for negligence as well as fraud is too firmly settled to be questioned.

"It is gross negligence in bank directors to commit the entire business of the bank to the cashier without supervision

or control on their part, although he may be an entirely competent man, and they are responsible in such case for all losses to the corporation from the *negligent* or criminal acts of the cashier, provided such losses could have been prevented by the exercise of proper diligence on their part."

Wallace *vs.* Lincoln Sav. B'k, 89 Tenn., pp. 631-'2.
Delano *vs.* Case, 19 Brad. (Ill.), 538.

For the liability of directors, and especially the president of a corporation, "by reason of negligence":

Cook on Stock and Stockholders, § 701-'3.
1 Morawitz on Corp., § 551, and cases cited.
2 Pomeroy Eq. Jur., § 1094.

Also Marshall *vs.* F. & M. Bank, 8 S. E., from p. 589 (last par.) to p. 591. 23 N. E.

Onderkirk *vs.* C. N. B'k, p. 877, lower part of first to middle of second column.

In this connection it is rather significant that the quotations from respondent's own cases, on pages 12 *et seq.* of his brief, show not only an entirely different state of facts from those in case at bar, but that under such facts the courts would have ruled differently. Thus in Witters *vs.* Soules (p. 12, Resp. Brief) stress is laid on the fact that cashier was of "large experience, able and competent;" but so little confidence was reposed in him in case at bar that he was put under direct supervision of executive committee and under supervision and *control* of president. See by-laws 7, 17, and 19, on pages 3 and 19 (last par.) of transcript.

So, in case of Clews *vs.* Bardon, it is emphasized on page 15 of respondent's brief that the directors charged were not clothed with any duties as president or executive committee; but even then "if they willfully shut their eyes or are guilty of such gross neglect as amounts to bad faith, they will be held responsible." (Bottom p. 16, Resp.'s Brief.)

(2.) RESPONDENT'S CLAIM THAT THE CAUSE OF ACTION, IF ANY, WAS AGAINST DEFENDANTS AS DIRECTORS MERELY, AND THAT BOARD OF DIRECTORS CANNOT DELEGATE ITS POWERS.

We quite fail to see why this objection comes under caption that bill states *no* cause of action. That it may also state a cause of action against defendant's associates does not go to show that it does not state a cause of action against the original defendants or the present defendant. This objection is for non-joinder or defect of parties. It was not raised by demurrer or answer and cannot be made on appeal.

Cal. Code Civ. Proc., §§ 430–'4.
Callahan *vs.* Bode, 84 Cal., p. 496.
Smith *vs.* Dorn, 96 *id.*, p. 83.

Aside from respondent's waiver of the foregoing objection, there is no merit in it.

"Members of executive committees of corporations are *personally* liable for losses happening through their mismanagement."

Thompson's Commentaries on Corporations, vol. III, § 3963.

Where but one director out of seven was sued it was held:

"If there be culpable negligence on the part of a director, an action may be maintained against him without joining his associates."

Horn *vs.* Silver M. Co., 42 Minn., at p. 199, and cases cited.
Shea *vs.* Mabry, 69 Tenn., at p. 344.

(3.) THE CLAIM THAT OUR BILL FAILS TO SHOW THERE ARE OTHER STOCKHOLDERS THAN PLAINTIFF.

Bill does aver that there were divers other stockholders (Tr., m. p. 2), and that there were seven directors (m. p. 4). If there was a formal defect in not averring that the other

stockholders were numerous, such objection must also be taken by demurrer or answer or be deemed waived.

Stewart *vs.* Erie Co., 17 Minn., top p. 373.
Cal. Code Civ. Proc., §§ 430–434.

Moreover, this court, in a similar case, has held it is immaterial whether there are other stockholders or not.

Stone *vs.* Chisolm, 113 U. S., p. 309 (end of opinion).

(4.) THE CLAIM THERE WAS NO PROPER DEMAND ON CONTROLLER OR CORPORATION TO BRING SUIT.

This is, at most, another formal defect which should have been raised by demurrer.

Hill *vs.* Haskin, 51 Cal., pp. 177–'8.
Cal. C. P., § 430–'4.

Moreover, in this case respondent shows that we asked both receiver and controller to sue, only omitting to ask the controller to ask the receiver to do so. This distinction is too fine. The law disregards trifles. It looks through the shadow to the substance. "The law neither does nor requires idle acts."

Cal. Civil Code, § 3532.

We pleaded that the controller and receiver refused to bring the suit asked or *any* suit, or to take *any* action (Tr., m. p. 22). A further demand was obviously useless.

"Where it appears it would be useless to make a demand, no demand is necessary to be alleged." (Smith *vs.* Dorn, 96 Cal., 73.)

As for the necessity of obtaining leave from the controller to sue, such a rule applies only to *court* receivers. This court has pointed out the radical distinction between the two kinds of receivers in Porter *vs.* Sabin, 149 U. S., 478; also

in another branch of this case. (*Ex parte* Chetwood, 165 U. S., at p. 457.)

THE JURISDICTIONAL QUESTION.

The court not having finally adjudged this question, we feel constrained in closing to refer to an authority which seems to have a very direct bearing in the Stateler case, which is but a branch of this (165 U. S., p. 456). The case referred to is that of—

Hot Springs School Dist. *vs.* Nat. Bk., 61 F., 417.

Further grounds of answer to respondent's claims and points have already been covered in our opening brief. For the reasons there and here presented, we respectfully submit that the judgment of the California supreme court should be reversed and the judgment of the superior court of San Francisco be reinstated.

JOHN CHETWOOD, JR.,
E. G. KNAPP,
Counsel for Plaintiff in Error.

Due service of the within Brief of Plaintiffs in Error is hereby admitted this _____ day of January, A. D. 1898.

_____

Attorneys for Defendant in Error.

6493. 273. 36.

Brief of Records for D.C. (Amo

Filed April 17, 1897.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 573.

SUPREME COURT, U. S.
FILED.
APR 17 1897
JAMES H. McKENNEY,
CLERK.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,

Plaintiff in Error,

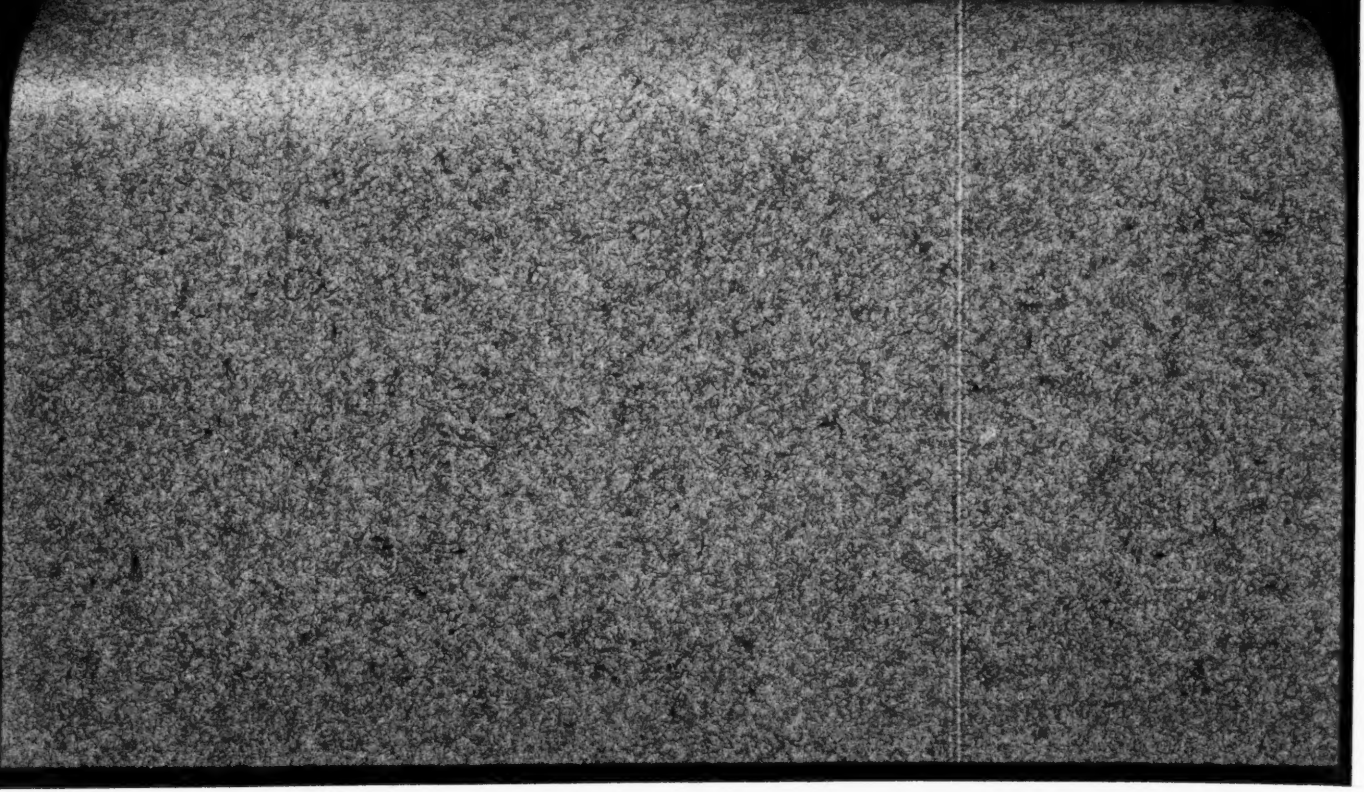
v.

RICHARD P. THOMAS and JOHN CHETWOOD, Jr.,

Defendants in Error.

NOTICE OF MOTION TO DISMISS WRIT OF ERROR, BRIEF IN SUPPORT THEREOF, AND NOTICE OF SUBMISSION OF MOTION.

FILED APRIL , 1897.



In the Supreme Court of the United States. October Term, 1896. No. 673.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, Plaintiff in Error,

v.

RICHARD P. THOMAS and JOHN CHETWOOD, JR., Defendants in Error.

Motion to Dismiss Writ of Error.

Comes now Richard P. Thomas, defendant in error, by his counsel appearing in that behalf, and moves this Honorable Court to dismiss the writ of error issued herein on the ground that this Honorable Court has no jurisdiction to review the judgment of the Supreme Court of the State of California, herein sought to be reviewed, in that:

1—No federal question was raised in the State court in the action in which said judgment was rendered.

2—There is no federal question iu said action.

3—Even if there is a federal question involved in said action, the decision of the appellate court was placed upon an independent ground not involving a federal question.

A. H. RICKETTS,

Counsel for Richard P. Thomas, Defendant in Error.

In the Supreme Court of the United States. October Term, 1896. No. 673.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, Plaintiff in Error,

v.

RICHARD P. THOMAS and JOHN CHETWOOD, JR., Defendants in Error.

Notice of Submission of Motion to Dismiss.

To Messrs. Eddy Knapp and A. W. Thompson, Counsel for Plaintiff in Error, and to John Chetwood, Jr., Defendant in Error:

Please take notice that on Monday, the 17th day of May, A. D. 1897, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

A. H. RICKETTS,

Counsel for Richard P. Thomas, Defendant in Error.

In the Supreme Court of the United States. October Term, 1896. No. 673.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, Plaintiff in Error,
v.
RICHARD P. THOMAS and JOHN CHETWOOD, JR., Defendants in Error.

Brief in Support of Motion of Richard P. Thomas, Defendant in Error, to Dismiss the Writ of Error issued herein to the Supreme Court of the State of California.

Richard P. Thomas, defendant in error, has moved to dismiss the writ of error issued herein, on the ground that this Hon. Court has no jurisdiction to review the judgment herein sought to be reviewed, in that:

1—No federal question was raised in the State court.

2—There is no federal question in the case.

3—Even if there is a federal question involved in the case, the decision of the appellate court was placed upon an independent ground not involving a federal question.

STATEMENT OF FACTS.

The history of the case as disclosed by the record is as follows: On December 15, 1888, the California National Bank of San Francisco, incorporated under the National Banking Act, being unable to meet its obligations, suspended business and closed its doors. On January 14, 1889, the Comptroller of the Currency of the United States, having completed a preliminary investigation of the condition of the bank, through the Bank Examiners, declared the corporation insolvent under the Act of Congress entitled, "An Act authorizing the appointment of Receivers of national banks and for other purposes," approved June 30, 1876, and appointed a Receiver to take charge of its affairs. Such receiver at once qualified and entered upon the duties of his office, and was in office at the time of the commencement of the action next hereinafter referred to. On the 19th day of July, 1890, John Chetwood, Jr., defendant in error, holding twenty shares of the capital stock of the corporation and no more, commenced a suit in the Superior Court of the City and County of San Francisco, State of California, as a stockholder, for the benefit of the corporation, against Richard P. Thomas, defendant in error, R. R. Thompson and Robert A. Wilson as the executive committee of the Board of Directors of the bank, to recover $400,000 as damages for negligence,

being the amount claimed by Chetwood to have been lost to the bank by reason of bad loans made by the Cashier, and which losses, it was alleged in the bill, would not have occurred if the said three Directors had properly supervised the acts of the Cashier,—a supervision alleged to have been imposed upon them as members of said Executive Committee by the By-laws of the corporation,—and made the bank and the Receiver parties defendant. This suit was entitled, "John Chetwood, Jr., Plaintiff, vs. The California National Bank of San Francisco, et al., Defendants." On the 10th day of January, 1893, the plaintiff filed his amended complaint. Demurrers were interposed by the several defendants and were overruled, and the case went to issue on the 9th day of June following upon the answer of the defendants, Thompson and Wilson, and a stipulation that their answer should stand as the answer of the defendants Thomas and the corporation. The Receiver did not answer. On April 27, 1894, the trial having taken place, the Court made its minute order directing a judgment to be entered in favor of the plaintiff, for the benefit of the corporation, and against the defendants Thomas, Thompson and Wilson, for an amount equal to the actual loss to the bank, resulting from the bad investments made by the Cashier, and, for the purpose of determining the amount for which the judgment should be entered, directed the appointment of a referee. Subsequently such referee was duly appointed and qualified, and, on the 17th day of August, 1894, he reported the aggregate amount of the actual loss to the bank, resulting from the bad investments made by the Cashier. On September 24th, 1894, Chetwood and the defendants Thompson and Wilson appeared in court and presented a stipulation dated September 13th, 1894, to the effect that the action should be dismissed as to Thompson and Wilson, whereupon a judgment was entered dismissing the action as to them. The consideration for such dismissal, as recited in the findings, was the payment by them of the sum of $27,500, which sum was received by the plaintiff and credited upon the amount found to be due to the bank from the three defendants, Thomas, Thompson and Wilson. Thomas was not a party to this arrangement, nor does it appear that he was ever notified of the plaintiff's intention of dismissing the action as to Thompson and Wilson. After this settlement was made with Thompson and Wilson, and on the 20th day of November following, findings were filed in which it was expressly found that the amount of the actual loss to the corporation was the sum of $166,919; that $27,500 had been paid on account of such loss by Thompson and Wilson, and that the net loss to the bank was $139,419, for which amount the Court ordered a judgment to be entered against Thomas, defendant in error. From that judgment an appeal was taken by Thomas to the Supreme Court of the State

of California. The decision was rendered by that court on July 22, 1896 (113 Cal., 414). The Supreme Court of the State of California reversed the judgment so rendered against Thomas, and directed a judgment to be entered in his favor against the plaintiff Chetwood, and in so deciding held that the suit sounded in tort and was simply an action to recover damages for negligence. The judgment was reversed on three grounds: *First*, that the court failed to find upon the most material issues of the case; *second*, that the case made out by the findings is a different case from that presented by the pleadings; and *third*, that the acceptance by the plaintiff in the action of $27,500 from Thompson and Wilson was a *retraxit* and an extinguishment of the cause of action as against Thomas.

POINTS.

I.

No federal question was raised in the State court.

This writ of error has been sued out in the name of the bank, as plaintiff in error, by John Chetwood, Jr., defendant in error and the original plaintiff in the State Court. He voluntarily brought the suit in the State Court, and there is no doubt that the State court at all times had jurisdiction of the case. (Ex parte—in the matter of John Chetwood, Jr., Petitioner, 17 Supreme Court Reporter, 385—opinion delivered February 15, 1897). The amended bill, upon which the case went to trial, shows that the plaintiff sued as a stockholder for the benefit of the bank, and alleges a demand upon the Board of Directors of the corporation, the Receiver and the Comptroller to bring the action, and their refusal. It then sets forth the organization of the defendant corporation as a national bank on October 20, 1886, with a capital stock of $200,000, divided into 2,000 shares of the par value of $1,000 each, and then alleges that the entire capital stock was subscribed for by various persons, and fully paid, and that the plaintiff therein owned 20 shares from its organization; that the articles of association provided for a Board of Directors to consist of seven shareholders, and that such Board was duly elected at the first meeting of shareholders at the time of the organization of the corporation, and thereupon entered upon the discharge of its duties; that the articles of association provided that such Board of Directors should elect from their number a President and Vice-President, should define the duties of the officers and clerks of the corporation, should make all By-laws which it might be convenient and proper to

make for the general regulation of the business of the corporation and the management and administration of its affairs, and generally to do and perform all the acts required of a Board of Directors. It then alleges the election of Thomas, Thompson and Wilson as three members of said Board of Directors at the first election for Directors, and their subsequent re-election at all subsequent annual meetings; and the holding of a meeting of the Board of Directors after the election of these three gentlemen, at which a code of By-laws was adopted which has never been changed. It then sets forth what purports to be section 7 of the code of By-laws, which provides for the appointment by such Board of Directors of a committee to be known as "The Executive Committee," to consist of the President and Vice-President and one or more Directors, "who shall have and exercise immediate supervision of all the affairs and business of the Bank; who shall audit all bills for current and other expenses; who shall have power to discount and purchase bills, notes and other evidences of debt, as well as power to buy and sell bills of exchange, coin and bullion, and loan money on personal security, and who shall report to the Board of Directors at each regular meeting." It also sets forth sections 17 and 18 of its code of By-laws, which regulate respectively the duties of the President and Vice-President, and then proceeds to allege the election of Thomas as President and Wilson as Vice-President of the corporation, and the appointment of Thompson to act with Thomas and Wilson as "The Executive Committee" of the bank, and then avers that Thomas, Thompson and Wilson constituted "The Executive Committee" from the organization of the bank until its suspension. It then alleges that as such Executive Committee certain duties were imposed upon the three members, who, not regarding their duties, "but wholly disregarding the same, and contriving together to injure and deceive the said corporation, neglected and omitted, without any reasonable excuse, to exercise their own skill, care, judgment and discretion in the making of loans and discounts out of the moneys in the possession of said bank, and otherwise directing the business of said bank, but they negligently permitted the cashier of said bank to control and manage the whole business of the said bank as he saw fit, and without consulting or in anywise informing the said defendants, or any or either of them, to lend the moneys of the bank according to his own pleasure, to buy bills of exchange without any consultation with said defendants," and then proceeds to aver that the said Cashier did loan out the moneys of the bank to "irresponsible persons with no adequate security, bought unauthorized, unsecured and valueless bills of exchange," and that by said negligence the moneys of the bank were wasted to the sum of

about $200,000. Then there are certain specific instances alleged where moneys were loaned by the Cashier and not returned, aggregating $85,500. Then comes an allegation that "by divers other like careless, unbusinesslike and improvident loans and transactions the said Cashier misused and lost divers other sums of money belonging to the bank, amounting in the aggregate to about $50,000 more." Then follows an allegation that by reason of all said loans, and *the failure of the borrowers to return the money*, the capital surplus of the bank became reduced from $230,000 to about $170,000, and that said sum of $170,000 suffered a still further diminution of more than $120,000 by certain transactions had with one Woodard and one Gutman, and that said reduction rendered it necessary for the bank to suspend payment and a Receiver to be appointed, and rendered necessary the levying by the Comptroller of the Currency of an assessment of $75,000 upon the stockholders, and that the members of the Executive Committee could have prevented the occurrence by giving attention to and discharging the duties of their said trust, and that had they done so none of said losses and improvident uses of money would have occurred, but that they neglected their duties and permitted the Cashier to do as he pleased with the moneys. Then follows an allegation that the corporation was doing a good business, and its profits ought to and would have been very large, as it had accumulated $30,000 in two years, but that this surplus was all lost by the improvident loans of the Cashier and the aforesaid negligence of the members of the Executive Committee in permitting him to make the loans. It is then averred that the bank suspended on December 15, 1888, owing about $450,000; that the Comptroller of the Currency of the United States took charge of the bank and placed a Receiver in charge, and that in order to pay the debts the Receiver had to sacrifice the assets of the bank to an extent of between twenty and thirty per cent, and that thereby the corporation lost between twenty and thirty per cent of its assets, and concludes with a prayer for a decree directing the defendants in said action, Thomas, Thompson and Wilson, to restore unto the corporation the $400,000 lost by their negligence, and that a money judgment against them, with legal interest thereon from the time of such loss, be rendered in favor of said corporation.

To this amended complaint special demurrers were interposed by the defendants and overruled. An answer was then interposed by two of the defendants in the action, Thompson and Wilson, which, by stipulation, was to stand as the answer of the defendants Thomas and the Bank. The answer denies that the members of the Executive Committee, or any of them, ever assumed or had any other supervision of the officers and busi-

ness of the corporation other than that imposed by section 7 of the By-laws, or that they ever had any duties to perform other than as set out in said section 7 of the By-laws. It then sets up section 19 of the By-laws, which defines the duties and powers of the Cashier, and section 24 of the By-laws, which provides for the appointment and duties of another sub-committee of the Board of Directors, to be known as the Auditing Committee. It then alleges the appointment of this committee upon the organization of the bank, and its existence during the period the bank remained in business. The answer denies specifically all the allegations of negligence set out in the amended bill, and sets up generally that the members of the Executive Committee acted with ordinary care and prudence in the management of the affairs of the bank.

We submit that no federal question has been set up by these pleadings. The sole proposition presented by the pleadings was: That because the Cashier of a National Bank, a trusted and honest official appointed by its Board of Directors, holding his office at the pleasure of the Board, made in good faith, but without the knowledge or advice of the Board or any of its members, loans which were unpaid at maturity, a sub-committee of three members of the Board, known as "The Executive Committee," are liable to the corporation in a civil suit for the amount of the loans and interest, under a By-law enacted prior to the making of the loans, giving this sub-committee the immediate supervision of the employees of the bank, and that such liability attached irrespective of the fact that no legal means had been resorted to to collect these notes.

The case went to the Supreme Court of California on an appeal from the judgment. There was no motion for a new trial, and upon such an appeal the inquiries of the appellate court were limited to two propositions:

First—Is the case made out by the findings the case presented by the pleadings?

Second—Do the findings support the judgment?

When the case reached the appellate court the appellant contended that the case made out by the findings was one for damages against him separately, resulting from his failure to perform the duties of his office as President of the bank, whereas the case made out by the pleadings was one against him and his co-defendants, Thompson and Wilson, jointly, for damages resulting from their failure to perform the duties of their office as Directors, and further that the findings did not support the judgment for the reason that the former showed that two of the joint tort-feasors had paid $27,500, and in consideration of such payment were released; and that such release operated as a release to the appellant and extinguished the debt.

No suggestion of any federal question was made to the trial or to the appellate court. No such question was ever raised until the presentation of the petition for the writ of error, and such petition forms no part of the record upon which action here is taken, Manning v. French, 133 U. S., 186; Railway Co. v. Fitzgerald, 160 U. S., 556-575. No original papers could be filed in the appellate court on that appeal. No federal question having been raised in the trial court, this court, therefore, has no jurisdiction to review the judgment of the appellate court. As was said by Chief Justice Fuller in Chappell v. Bradshaw, 128 U. S., 132: "To give this court jurisdiction to review the judgment of a State court under section 709 of the revised statutes, because of the denial by a State court of any title, right, privilege, or immunity claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was 'specially set up or claimed' at the proper time, in the proper way. 'To be reviewable here,' says Waite, C. J., in Spies v. Illinois, 123 U. S., 181, 'the decision must be against the right so set up or claimed. As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more.' Tested by this well-settled rule it is apparent that this writ of error cannot be maintained, as it is conceded that the plaintiff in error did not set up or claim in the trial court the limitation, the benefit of which he now insists should have been accorded him."

In the still later case of Fowler v. Lamson, decided November 30, 1896, 17 Supreme Court Rep., 112, this Court again says: "Thus, there is an entire absence in this whole record of any fact showing that the Supreme Court of Illinois, or either of the lower courts, decided any federal question whatever. The assignment of errors alleged to have been made by the Illinois Supreme Court is unavailable for the purpose of showing any federal question decided, where the record itself does not show that any such question was passed upon by the State court. Railway Co. v. Fitzgerald, 160 U. S., 556–575.

"Where a case is brought to this court on error or appeal from a judgment of a State court, unless it appear in the record that a federal question was raised in the State court before the entry of final judgment in the case, this court is without jurisdiction. Simmerman v. Nebraska, 116 U. S., 54.

"It has also been frequently decided that, to give this court jurisdiction on writ of error to a State court, it must appear affirmatively, not only that a federal question was presented for decision by the State court, but that its decision was necessary to the determination of the cause, and that it was decided

adversely to the party claiming a right under the federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. Eustis v. Bolles, 150 U. S., 361; Powder Works v. Davis, 151 U. S., 389–393; Railway Co. v. Fitzgerald, 160 U. S., 556–576.

"Nothing of the kind appears from this record, and the writ of error must therefore be dismissed."

II.

There is no federal question in the case.

The claim is made here on behalf of the plaintiff in error that, because the Supreme Court of the State of California, in reversing the judgment sought to be reviewed here, held that the acceptance by Chetwood, as plaintiff in the original action, of $27,500 from two of the defendants, operated as an extinguishment of the debt of the bank against all three defendants, the bank has by that decision been deprived of its property, namely, its judgment against Thomas, without due process of law. As the bank was a party to the action, and had been duly served, it is difficult to see how this view could prevail. But the position taken by the appellate court is that the action sounded in tort, and their application of the well settled rule that the release of one joint tort-feasor is the release of all the others certainly can not involve a federal question, even if the tort-feasors were directors of a national bank.

III.

Even if there is a federal question involved in the case, the decision of the appellate court was placed upon an independent ground not involving a federal question.

One of the grounds upon which the appellate court placed its decision was that the trial court had failed to find upon the most material issues of the case. This necessitated a reversal of the judgment.

Laughlin v. *Wright*, 63 Cal., 113.
S. P. Co. v. *Crampton*, 63 Cal., 537.

Surely, by the most refined reasoning, no federal question can be involved in reaching that conclusion. Another ground upon which the State Court placed its decision was that the case made out by the findings is a different case from that presented by the pleadings, and, in this regard, it held that while the pleadings

presented a case against the three Directors for damages for neglecting to perform their duties as Directors, yet the findings showed a case against Thomas, the President, for failing to perform the duties of his office as President. This also necessitated a reversal.

Bryan v. *Tormey*, 84 Cal., 126.
Putnam v. *Lamphier*, 36 Cal., 151.

And no federal question could be involved in reaching this conclusion.

The third ground was as above stated, that the acceptance by the plaintiff from two of the joint tort-feasors of an amount less than the whole judgment released the third tort-feasor, and was an extinguishment of the debt, and we have already presented our views in support of the proposition that no federal question was involved in reaching this conclusion.

It is respectfully submitted that the writ of error be dismissed.

A. H. RICKETTS,
Counsel for Richard P. Thomas, Defendant in Error.

Transcription.

No. 275.

Brief of Ricketts for D. E.

FILED,
JAN 12 1898
JAMES H. McKENNEY
CLERK

BRIEF ON BEHALF OF RICHARD P. THOMAS,

DEFENDANT IN ERROR.

Filed Jan. 12, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 275.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,

Plaintiff in Error,

vs.

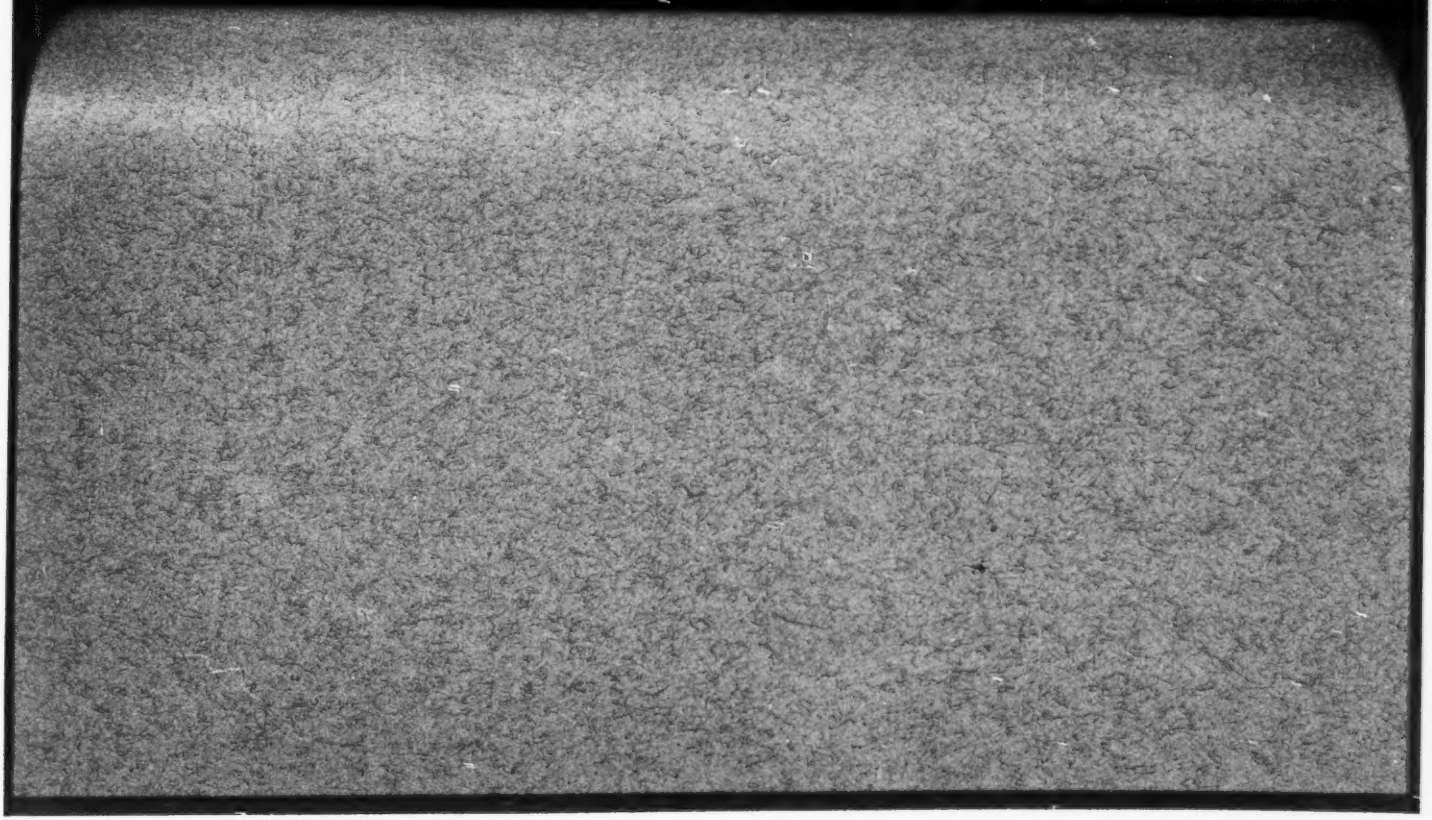
RICHARD P. THOMAS,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

A. H. RICKETTS,

Counsel for Defendant in Error.



(16,452.)

In the Supreme Court of the United States. October Term, 1896. No. 673.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, Plaintiff in Error,

vs.

RICHARD P. THOMAS, Defendant in Error.

In Error to the Supreme Court of the State of California.

BRIEF ON BEHALF OF RICHARD P. THOMAS, DEFENDANT IN ERROR.

In the Petition for Writ of Error (Transcript 109), John Chetwood, Jr. is named as one of the defendants in error. In printing the transcript, his name has been omitted from the caption, perhaps through mistake. We follow the caption of the transcript, and throughout this brief refer to Richard P. Thomas as the Defendant in Error.

The case sought to be reviewed here came before the Supreme Court of the State of California on an appeal from a judgment of the Superior Court of the City and County of San Francisco, State of California, rendered in favor of the plaintiff in error and against the defendant in error Richard P. Thomas for $139,419, interest at 7 per cent from December 15, 1888, and costs, in an action entitled John Chetwood, Jr., plaintiff, v. The California National Bank of San Francisco, a corporation, Richard P. Thomas, Robert R. Thompson, Robert A. Wilson and S. P. Young, Receiver of said bank, defendants.

History of the Case.

The history of the case, as disclosed by the record, is as follows: On December 15, 1888, The California National Bank of San Francisco, incorporated under the National Banking Act, being unable to meet its obligations, suspended business and closed its doors. On January 14, 1889, the Comptroller of the Currency of the United States, having completed a preliminary examination of the condition of the bank through the Bank Examiners, declared the corporation insolvent under the Act of Congress entitled "An Act authorizing the appointment of Receivers of National Banks and for other purposes," approved June 30th, 1876, and appointed a Receiver to take charge of its affairs. Such Receiver at once qualified and entered upon the duties of his office, and was in office at the time of the commencement of the action. On the 19th day of July, 1890, John Chetwood, Jr., holding twenty shares of the capital stock of the corporation, commenced this suit as a stockholder, for the benefit of the corporation, against the defendant in error and the defendants Thompson and Wilson, composing the Executive Committee of the Board of Directors of the Bank, to recover four hundred thousand dollars as damages for negligence, being the amount claimed to have been lost to the bank by reason of bad loans made by the Cashier, and which losses, it was alleged, would not have occurred if the said three directors had properly supervised the acts of the Cashier,—a supervision claimed to have been imposed upon them as members of said Executive Committee by the By-Laws of the corporation,—and made the corporation and the Receiver parties defendant. On the 10th day of January, 1893, the plaintiff filed his amended complaint. Demurrers were interposed by the several defendants and were overruled, and the case went to issue on the 9th day of June following upon the answer of the defendants Thompson and Wilson, and a stipulation that that answer should stand as the answer of the defendant in error Thomas and the corporation. The Receiver did not answer. On April 27, 1894, the trial having ended, the Court made its minute order directing a judgment to be

entered in favor of the plaintiff therein for the benefit of the corporation and against the defendants therein—Thomas, Thompson and Wilson, and for the purpose of determining the amount for which the judgment should be entered, directed the appointment of a Referee to state an account of the amount due to the Bank from the said Richard P. Thomas, R. R. Thompson and Robert A. Wilson. (Trans., 59.) Subsequently, such Referee was duly appointed and on the 17th day of August, 1894, he reported the amount in which the three parties named in said order of reference were indebted to the Bank on the date of its suspension. On September 13, 1894, the plaintiff therein and the defendants therein Thompson and Wilson, appeared in the Superior Court and stipulated that the action should be dismissed as to Thompson and Wilson; whereupon a judgment was entered, dismissing the action as to them (Trans., 64–69.) The consideration for such dismissal was the payment by them of the sum of $27,500.00, which sum was received by the plaintiff therein, and credited upon the amount found to be due to the Bank by reason of the Cashier's bad loans. (See Findings, trans., 87.) Defendant in error Thomas was not a party to this arrangement, nor did he have any notice of such proposed settlement, or of the plaintiff's intention of dismissing the action as to Thompson and Wilson. After this settlement was made with Thompson and Wilson, and on the 20th day of November following, findings were filed in which it was expressly found that the amount of the actual loss to the corporation was the sum of $166,919, that $27,500.00 had been paid on account of such loss by Thompson and Wilson, and that the net loss to the Bank was $139,419.00, for which amount, the Court ordered a judgment to be entered against defendant in error Thomas alone. Pursuant to said order judgment was entered accordingly.

Upon an appeal from this judgment by defendant in error to the Supreme Court of the State of California, the judgment was reversed, and a judgment for costs directed by the Appellate Court to be entered in favor of the defendant in error against the plaintiff in said action Chetwood, and, in so deciding, the Appellate Court held that the suit sounded in *tort,*

being for the recovery of damages for negligence. The reversal of this judgment was based on three grounds: 1—That the Trial Court failed to find upon the most material issues of the case. 2—That the case made out by the findings is a different case than that presented by the Pleadings. 3—That the acceptance by plaintiff in said action of $27,500 from two of the defendants therein, Thompson and Wilson, was a *retraxit* and an extinguishment of the cause of action against all.

Various other objections were advanced on appeal by the defendant in error here, but the Appellate Court considered it unnecessary to pass upon them, that Court expressly stating in its opinion (Trans. 98) that, upon the points raised and not passed upon, its silence was not to be construed as a determination of them.

A motion to dismiss this Writ of Error in that: 1—No federal question was raised in the State Court in the action in which said judgment was rendered. 2—There is no federal question in said action. 3—Even if there is a federal question involved in said action, the decision of the Appellate Court was placed upon an independent ground, not involving a federal question—has been made and submitted with briefs *pro* and *con*, but this Court has postponed action upon the motion to dismiss until the cause came before it regularly on its merits.

The assignments of error are numerous, somewhat verbose, and, we may be pardoned in saying, somewhat tautological. We think there are only three propositions arising from the record which require discussion, the determination of any one of which in favor of the defendant in error, must necessarily result in the affirmance of the judgment of the Supreme Court of the State of California, unless the motion to dismiss shall have prevailed. These three propositions generally stated are as follows:

A.

The Bill in the original action fails to state a cause of action against any of the defendants therein named.

B.

The case found in the Findings is not the case presented by the pleadings.

C.

The Findings do not sustain the judgment.

A.

The Bill in the original action fails to state a cause of action against any of the defendants therein named.

The Amended Complaint, upon which the case went to trial and which will hereafter be called the "Bill" (Trans. 1–24), shows that the plaintiff sued as a stockholder for the benefit of the defendant corporation, and alleges a demand upon the Board of Directors of the corporation, the Receiver and the Comptroller to bring the action and their refusal. The Bill sets forth the organization of the defendant corporation as a National Bank on October 20th, 1886, with a capital stock of two hundred thousand dollars divided into two thousand shares of the par value of one thousand dollars each; and alleges that the entire capital stock was subscribed for by various persons and fully paid and that plaintiff has owned twenty shares from its organization; that the Articles of Association provided for a Board of Directors to consist of seven shareholders and that such Board was duly elected at the first meeting of shareholders at the time of the organization of the corporation, and entered upon the discharge of its duties; that the Articles of Association provided that such Board of Directors should elect from their number a President and Vice-President; should define the duties of the officers and clerks of the corporation; should make all By-Laws which it might be convenient and proper to make for the general regulation of the business of the corporation and the management and administration of its

affairs, and generally to do and perform all the acts legal for a Board of Directors to do; the election of the three individual defendants,—the defendant in error, Thompson and Wilson,—as three members of the Board of Directors, at the first election for Directors, and their subsequent re-election at all subsequent annual meetings; and the holding of a meeting of the Board of Directors after their election, at which a Code of By-Laws was adopted which has never been changed. It then sets forth Section 7 of the Code of By-Laws, which provides for the appointment by said Board of Directors of a committee to be known as the Executive Committee to consist of the President and Vice-President and one or more Directors, "who shall have and exercise immediate supervision of all the affairs and business of the bank; who shall audit all bills for current and other expenses, who shall have power to discount and purchase bills, notes and other evidences of debt as well as power to buy and sell bills of exchange, coin and bullion, and loan money on personal security, and who shall report to the Board of Directors at each regular meeting," and also sets out Sections 17 and 18 of said Code of By-Laws, which regulate respectively the duties of the President and Vice-President. It further alleges the election of defendant in error as President, and of the defendant Wilson as Vice-President, of the corporation, and the appointment of the defendant Thompson as one of said Executive Committee to act with defendant in error and Wilson, and avers that said three defendants constituted the Executive Committee from the organization of the Bank until its suspension. It then alleges that *as such Executive Committee* certain duties were imposed upon the three members who not regarding their duties, "but wholly disregarding the same and contriving together to injure and deceive the said corporation, neglected and omitted, without any reasonable excuse, to exercise their own skill, care, judgment and discretion in the making of loans and discounts out of the moneys in the possession of said Bank and otherwise directing the business of said Bank, but they negligently permitted the Cashier of said Bank to control and manage the whole business of the said Bank as he saw fit and without consulting or in any wise in-

forming the said defendants or any or either of them, to lend the moneys of the Bank according to his own pleasure, to buy bills of exchange without any consultation with said defendants," and then avers that the said Cashier did loan out the moneys of the Bank to "irresponsible persons with no adequate security, bought unauthorized, unsecured & valueless bill of exchange," and that by said negligence the moneys of the Bank were wasted to the sum of about Two Hundred Thousand Dollars. Then, there are certain specific instances alleged where moneys were loaned by the Cashier and not returned, aggregating, Eighty-five Thousand Five Hundred Dollars. Then comes an allegation that " by divers other like careless, unbusinesslike & improvident loans & transactions the said Cashier misused & lost divers other sums of money belonging to the Bank, amounting in the aggregate to about $50,000 more." Then follows an allegation that by reason of all said loans and *the failure of the borrowers to return the money*, the capital surplus of the Bank became reduced from Two Hundred and Thirty Thousand Dollars to about One Hundred and Seventy Thousand Dollars, and that said sum of One Hundred and Seventy Thousand Dollars suffered a still further diminution of more than One Hundred and Twenty Thousand Dollars by certain transactions had with one Woodard and one Gutman, and that said reduction rendered it necessary for the Bank to suspend payment and a Receiver to be appointed, and rendered necessary the levying of an assessment of Seventy-five Thousand Dollars upon the stockholders, and that *the members of the Executive Committee* could have prevented the occurrence by giving attention to and discharging the duties of their said trust and that, had they done so, none of said losses and improvident uses of money would have occurred, but that they neglected their duties and permitted the Cashier to do as he pleased with the moneys. Then follows an allegation that the corporation was doing a good business and its profits ought to and would have been very large as it had accumulated Thirty Thousand Dollars in two years, but that this surplus was all lost by the improvident loans of the Cashier and the aforesaid

negligence of the members of the Executive Committee in permitting him to make the loans. It is then averred that the Bank suspended on December 15th, 1888, owing about Four Hundred and Fifty Thousand Dollars; that the Comptroller of the Currency of the United States took charge of the Bank and placed the defendant, S. P. Young, in charge as Receiver, and that in order to pay the debts he had to sacrifice the assets of the Bank to an extent of between twenty and thirty per cent. and that thereby the corporation has lost between twenty and thirty per cent. of its assets, and concludes with a prayer for a decree directing the defendant in error Thomas, and his co-defendants Thompson and Wilson to restore unto the corporation the Four Hundred Thousand Dollars lost by their negligence and that a money judgment against them with legal interest thereon from the time of such loss be rendered in favor of said corporation.

To this amended complaint, special demurrers were interposed by all the defendants (Trans. 10–18) and overruled (Trans. 18).

The proposition presented by the Bill is simply this:—That because the Cashier, an official appointed by the Board of Directors of the Bank, holding his office at the pleasure of the Board, made in good faith, but without the knowledge or advice of the Board, or any of its members, loans which were unpaid at maturity, that a sub-committee of three members of the Board, known as the Executive Committee, are liable to the corporation in a civil suit for the amount of the loans and interest, for the reason that the Board of Directors had, prior to the making of the loans, enacted a By-Law which gave this sub-committee the immediate supervision of the employees of the Bank, and that such liability attached irrespective of the fact that no legal means had been resorted to to collect these notes. In other words, the bill seeks to hold the three members of the Executive Committee as guarantors of all loans made by the Cashier of the Bank.

1.

THE ACTS OF OMISSION SET OUT IN THE BILL, TAKEN AS CONFESSED, DO NOT CONSTITUTE SUCH NEGLIGENCE UPON THE PART OF THE INDIVIDUAL DEFENDANTS IN SAID ACTION, AS TO RENDER THEM OR ANY OF THEM LIABLE FOR DAMAGES TO THE CORPORATION.

From an examination of this Bill it will be seen that the suit is not brought against the three individual defendants therein *as Directors*, but is against them as *members of the Executive Committee*. But even then it is not to recover moneys lost to the Bank by reason of any *fraud* upon the part of the members of the Executive Committee. There is no such intimation, nor is it claimed that any of the moneys so lost benefited in any way any of the members of the Executive Committee. *The Cashier is not charged with fraud.* It is averred that he loaned the moneys of the Bank to "divers irresponsible persons with no adequate security," but it is nowhere averred that he, at the time the loans were made, knew the borrowers to be irresponsible persons or the security offered inadequate; nor is it averred that the members of the Executive Committee knew the borrowers to be irresponsible persons or the security offered inadequate; nor is it averred that the Cashier was incompetent or that any of the members of the Executive Committee had any reason to believe him incompetent, or that any lack of care had been shown by the Board of Directors in selecting him or continuing him in his position. There is no claim that any moneys have been embezzled by anyone, or that loans have been made beyond the statutory limit, or that false entries have been made in the books or that the Directors sent false reports to the Comptroller, or that the Directors knew the Bank was insolvent before the suspension and concealed that fact from the Comptroller or the public. No suspicion of bad faith is breathed from the pages of the Bill. There is no allegation in the Bill as to how the loans were shown to be worthless. Debts are not usually considered worthless until all legal means for their

collection have been exhausted, but it is not alleged that any legal means were ever taken by the corporation to collect these debts. It simply shows that these loans were outstanding at the time suit was brought. For all that appears on the face of the Bill, suits may have been then pending against the borrowers to recover the money, and there is nothing to show but that such suits would terminate happily in the collection of the full amount of the principal and interest of the loans. Upon what theory could even the Directors be held on such a showing? And upon what possible theory could the Executive Committee of the Board of Directors be held on such a showing? The Executive Committee are simply agents of the Directors. If liable at all to a shareholder as Executive Committeemen, their liability, we take it, could not exceed the liability of their principals. What is the liability of Directors of a National Bank in a case of this kind? The Directors are not insurers of the unerring judgment of the Bank's Cashier. The assumption of the duties of Director hardly carries with it an insurance policy to the stock-holders that they would jointly and severally make good to the Bank losses made in the regular and ordinary course of business. Then, if they are not insurers, not guarantors, how can they be required to make good a loss before it is ascertained that any loss exists? The Bill does not even allege that these loans had matured at the time the suit was brought, but, assuming that they had matured and were unpaid, would not the corporation or its Receiver have to make some legal effort to collect the loans before it could be claimed that they were lost to the Bank? Gentlemen who accept the office of Directors of a Bank are usually engaged in some other business, and they are generally wise enough to employ skilled officers to attend to the Bank's business. Would they not have a right to trust their Cashier, and, before they could be held liable for his errors of judgment in discounting paper or making loans, would it not have to be shown at least that the Cashier had acted in bad faith? Yet, there is not one line in this whole bill intimating that the Cashier acted in anything except the best faith.

There is no provision in the National Banking Law which

holds the Directors liable for bad loans made by an employee. Section 5209 Revised Statutes provides that "every President, Director, Cashier, Teller, Clerk, or Agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds or credits of the association," shall be deemed guilty of a misdemeanor, and Section 5239 provides that "if the directors of any National Banking Association shall *knowingly* violate, or *knowingly* permit any of the officers, agents or servants of the association to violate any of the provisions of this Title, all the rights, priveleges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial Court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation." These are the only provisions in the National Banking Laws regulating the liability of Directors. Before they could be sued for damages under this section, the franchise of the Bank would have had to be adjudged forfeited by a Federal Court in a suit brought for that purpose by the Comptroller of the Currency himself, and even then before they could be held liable for the losses it would have to be shown that they *knowingly* violated or *knowingly* permitted the officers or employees of the Bank to violate the provisions of the Banking Act. *Knowledge* upon the part of the Directors is not charged in the Bill. Indeed it is averred that the bad loans were made by the Cashier without "any consultation with said defendants or any, or either of them." (Trans. 13.) So, in the absence of any statutory liability, the civil liability of these defendants, if it exist at all, exists at common law.

We have not been able to find any case parallel to this in the books. In all the reported cases the suit has been against *Directors as Directors*, not as members of a sub-committee of

the Board for failure to perform a duty under a By-Law, and the Bill has alleged, in some shape or other, fraud or wilful misconduct upon the part of the Directors, and in all the cases the Directors who participated in the fraud have been made parties defendants, but all such suits have been brought to recover damages against such Directors for doing something which they should not have done. There have been a number of cases brought by stockholders of suspended banks, seeking to hold the Directors liable in damages for the bad loans, or misapplication of funds which has resulted in the Bank's failure, but in every case *knowledge* of the misapplication of the funds has been averred. Most of these suits have arisen in the Federal Courts. We refer only to those cases where the principles involved are similar to the principles involved in the case at bar.

In Witters *vs.* Sowles, 31 Fed., 1, (Circ. ct. Dist. Vermont) which was an action brought against the Directors of an insolvent national bank by the Receiver appointed by the Comptroller of the Currency, to recover moneys which the Directors had unlawfully disbursed by way of dividends, and also for losses in consequence of bad loans and discounts, it appeared that the business of the Bank was managed principally by the cashier, who was of large experience, able and competent and of good reputation and until near the time of the failure of considerable wealth. All the loans and discounts were made by him. One of the losses complained of was a loan in excess of one-tenth of the capital stock and in violation of the provisions of Section 5200 of the Revised Statutes. Two of the defendants were held liable for that sum on the express ground that they participated in and assented to the loan, and on that ground only. The decision was to the effect that the officers of an insolvent National Bank could not be held personally responsible to creditors for losses on loans and discounts made by them in good faith, and as they thought at the time for the best interests of the Bank, merely because such losses and discounts appeared to be unwise and hazardous when looked back upon. *In re* Spering's Appeal, 71 Pa. State, 13, (Supreme Ct. Pa.) it was held that while the Direct-

ors were personally responsible to the stockholders for any loss resulting from fraud, embezzlement, or wilful misconduct or breach of trust for their own benefit and not for the benefit of the stockholders, for gross inattention and negligence by which such fraud or misconduct had been perpetrated by the agents, officers or co-directors, yet they were not liable for mistakes of judgment even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest, and provided they are fairly within the scope of the power and discretion confided to the managing body. Judge Sharswood in that case speaking for the Court says: "It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are, undoubtedly, said in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any other bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries, —persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence but no more. * * * We are dealing now with their responsibility to stockholders, not to outside parties,—creditors and depositors. It is unnecessary to consider what the rule may be as to them. Upon a close examination of all the reported cases, although there are many *dicta* not easily reconcilable, yet I have found no judgment or decree which has held directors to account, except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties. I do not mean to say by any means that the irresponsibility is limited to these cases, and that there might not exist such a case of negligence, or of acts clearly *ultra vires*, as would make perfectly honest directors personally liable. But it is evident that gentlemen selected by the stock-holders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentlemen of

character and responsibility would be found willing to accept such places." In Land Credit Co. *vs.* Fermoy, L. R. 5, Ch. 763, this rule was laid down by Lord Hatherley: "Whatever may be the case with a trustee, a director cannot be held liable for being defrauded. To do so would make his position intolerable." In Re Dean Coal Min. Co., 10 Ch. Div., 450, Sir George Jessel, M. R., says: "One must be very careful in administering the law of joint stock companies not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the Court should do its utmost to bring fraudulent directors to account; and, on the other hand, should also do its best to allow honest men to act reasonably as directors. Wilful default no doubt includes the case of a trustee neglecting to sue, though he might by suing earlier have recovered a trust fund. In that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle." Preston *vs.* Prather, 137 U. S. 604, was a case of persons engaged in the business of banking, having received for safe keeping a parcel containing bonds, which was put in their vaults. They were notified that their assistant cashier, who had free access to the vaults where the bonds were deposited and who was a person of scant means, was engaged in speculation in stocks. They made no examination of the securities deposited with them, and did not remove the Cashier; and it was held that the bankers were guilty of gross negligence, and were liable to the owner of the bonds for their value at the time they were stolen. Mr. Justice Field delivering the opinion of the Court says: "Undoubtedly, if the bonds were received for safe keeping, without compensation to them in any form, but exclusively for the benefit of the plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. No one taking upon himself a duty for another without consideration is bound either in

law or morals to do more than a man of that character would do generally for himself under like conditions." In the case at bar it is not claimed that by reason of the inattention and negligence of the Executive Committee any fraud or misconduct was perpetrated by the agents or officers of the Company. It is simply claimed that by reason of their inattention and negligence, loans were made by the Cashier which resulted in a loss to the Bank. Throughout the whole Bill there is nothing to show that the members of the Executive Committee or the Directors knew that these loans were being made by the Cashier, and if they had no knowledge of the Cashier's action, how can they be held liable for failure to stop the making of the loans? Clews *vs.* Bardon, 36 Fed. 617, was in the nature of a bill by the stockholders of a National Bank against the Directors to recover losses incurred in consequence of loans and discounts which turned out to be bad, on the ground of the alleged negligence of the said Directors in permitting such loans to be made in excess of the legal limit provided by the National Banking Law. Among the charges made was one that the Directors allowed the Cashier of the Bank to make bad loans of money which the Directors afterwards compromised at twenty cents on the dollar, netting a heavy loss to the Bank. The opinion is by Bunn, J., Circuit Court, E. D. Wisconsin, and was rendered in 1888. The following is from the opinion :—"Though the testimony is quite voluminous, these seem to be the leading facts on which the case must be decided, and the question is whether there is enough proven on behalf of the complainants to make the defendants liable, under the provisions of the banking act, for the loss to the stockholders. There is not, if by a proper construction of the statute it is necessary to show that the directors had actual knowledge, or in some way participated in, connived at, or assented to, the violation of the law on the part of the Cashier ; because there is no evidence even tending to show any such knowledge, participation, or complicity on the part of directors. The evidence shows, on the contrary, that they had no knowledge of any such violation of the law until after it took place ; nor did they approve or consent to it. But, as I understand the position

of complainant's counsel, it is that such actual knowledge or consent need not be shown; that it is enough to show that the directors, who, by virtue of their office, are vested with the authority and duty to look into and manage the affairs of the bank, if they conferred that authority, and imposed that duty, upon the cashier, and allowed him to manage the bank,—that the directors are legally chargeable with knowledge of all that the cashier did. But I cannot think that such a mere constructive knowledge of or assent to the illegal acts of the cashier, in the circumstances of this case, is what is contemplated by the statute as sufficient to charge the directors personally, with all the consequences of such illegal acts. This might and probably would be so, if the exclusive duty of managing the active affairs of the Bank was devolved upon the Directors. But it seems clear enough that, under the law as it stands, and as it stood in 1882, the management of the Bank might be intrusted either to the Directors or to the Cashier or other officers. If this was the case, then it would be just as legal and proper to intrust the matter of making loans and discounts to the Cashier, as was done in this case, as to intrust the same duty to the Directors. And every business man knows as a matter of common observation, throughout this part of the country at least, that business is generally left with the officers of the bank, rather than with the directors. And in all such cases the position of a director would be intolerable if, having his own money invested in the bank, and himself acting without compensation, and having exercised all the diligence in his power in the proper selection of the officers, he were to be chargeable with the mistakes and shortcomings of such officers. I think the Banking Act places their liability upon the true ground, and that it stands about as it would in the like circumstances at the common law. In either case the director is bound to good faith. He must act honestly. He must not commit fraud, nor be privy to it, nor wilfully shut his eyes, and abstain from making inquiries. If he has knowledge that an illegal transaction is to be enacted by the officers in charge, and consents to it, or connives at it, or wilfully shuts his eyes, and permits it to be done, or is guilty of such

gross and wilfull neglect of duty as amounts to bad faith, he will be held responsible. This was so at the common law, and is no doubt so under the Banking Act. But where the directors act in entire good faith, and select a person to manage the affairs of the bank, whom they have every reason to believe is competent and honest, they themselves having had no experience in banking, they have done just what the stockholders themselves would have done in the same circumstances. They have acted prudently, and with proper caution, as ordinarily prudent business men would act in reference to their own affairs. Under such circumstances, to hold them chargeable with knowledge of all the illegal acts of the person selected to manage the bank would be a harsh rule. The honor of being a resident director would scarcely compensate for such a responsibility. The directors, in this case, I think used all proper caution and diligence in the selection of a cashier. He was the person recommended by the principal stockholders, and the one in whom they placed their confidence. His reputation was good, and the directors had entire confidence in his honesty, and ability to run the bank; and, when they had reason to distrust his competency, they took the management of the Bank into their own hands. The evidence does not even raise a suspicion that they did not act in entire good faith from first to last, and I think they acted with ordinary prudence and discretion. They had their own money invested in the stock of the bank. They were giving a portion of their time to forward the common interests of the bank, without pay. Under these circumstances, to hold them liable for the mistakes of the cashier, whom all trusted alike, in making loans in excess of the statutory limitation, to which the directors were not privy, nor consenting, would seem to be harsh and inequitable. And I cannot think that such a construction of the act of Congress can be maintained, and I am the more confirmed in this view by the few adjudged cases that have arisen under these provisions." But the suit at bar is not to recover moneys loaned in excess of the statutory limitation, and there is no allegation in the Bill we are considering that any of the loans of the Cashier were compromised *and*

the actual loss to the Bank ascertained. It will be noticed that in the case last above cited the actual loss to the Bank was ascertained before the suit was brought, and properly alleged in the Bill. Briggs *vs.* Spaulding, 141 U. S. 132, was a suit by the Receiver for the First National Bank of Buffalo against the Directors and personal representatives of deceased directors of the bank to recover damages for the misconduct of the directors and their failure to perform faithfully and diligently the duties of their office, and particularly for failing to keep correct books of account and employing competent officers and in supervising the business, as a result of which, bad loans were made by incompetent and dishonest officials known by the directors, it was alleged, to be incompetent and dishonest at the time they were appointed and the bank made a heavy loss and had to suspend business. The decision is by Chief Justice Fuller. The case is a very strong one, and we think decisive of the question we are discussing. The opinion reviews all the leading decisions on this subject and in every case there mentioned, the Court will find that there are allegations of fraud or wilfull misconduct against the directors. Attention is particularly invited to that portion of Chief Justice Fuller's opinion which quotes approvingly the following language from the opinion of Vice Chancellor McCoun in Scott *vs.* Depeyster, 1 Edw. Ch. 513:—"I know of no law which requires the "president or directors of any moneyed institution to adopt a "system of espionage in relation to their secretary or cashier "or any subordinate agent, or to set a watch upon all their "actions. While engaged in the performance of the general "duties of their station, they must be supposed to act honestly "until the contrary appears; and the law does not require "their employers to entertain jealousies and suspicions without "some apparent reason. Should any circumstance transpire "to awaken a just suspicion of their want of integrity and be "it suffered to pass unheeded a different rule would prevail "if a loss ensued, but without some fault on the part of the "directors amounting either to negligence or fraud, they can-"not be liable," and counsel is respectfully requested to point out a single allegation in the Bill under review of what pur-

ports to be a fact in reference to the conduct of the cashier which, brought to the attention of the Directors, as men of ordinary intelligence, would be calculated to awaken in their minds a suspicion of a want of integrity or business capacity upon the part of that official. It must also be borne in mind that in the case at bar the Executive Committee did not appoint the cashier. He was appointed by the Board of Directors. The national banking law vested the appointment of a cashier solely in the Board of Directors. It gave the Board alone the power to dismiss him and appoint another to fill his place. (Section 5136 Rev. Stat.) There is no allegation in the Bill we are considering that by the exercise of ordinary care the Directors could have ascertained that the cashier was making these loans. There is no allegation that an examination of the books would have resulted in a discovery that loans were being made, nor is there any allegation upon which to justify the belief that the Executive Committee, even if acting honorably, would have acted any differently from the cashier if they had known that applications for loans had been made. In Savings Bank *vs.* Caperton, 8 Southwestern Rep. 885 (Court of Appeals, Ky.) suit was brought to recover from the directors moneys that had been embezzled by the cashier, yet, the judgment was in favor of the directors, the Court holding that there was no reason to charge the directors personally by reason of the fraud of the cashier, when no breach of duty on the part of the cashier had been brought home to the directors and the defalcation resulted from no act of their own. In the Chemical National Bank of New York *vs.* Armstrong, 65 Fed. Rep. page 573,—Circuit Court of Appeals for the Sixth Circuit,—the Court refused to hold the Fidelity National Bank of Cincinnati liable for money borrowed by its Vice-President without the authority of the Board of Directors from the defendant bank. In Robinson *vs.* Hall, 63 Fed. Rep. 222—from the Circuit Court of Appeals for the Fourth Circuit—the Court held that a bill filed by the receiver of an insolvent national bank against the directors of the bank charging them with personal liability for certain losses caused by their negligence stated a sufficient cause of action, but in that case, the facts

were very different from the facts in the case at bar. There, the entire management of the Bank had been practically left to the cashier by the Board of Directors for three years. The Bill alleged fraud upon the part of the cashier, the fraudulent transactions beginning in 1888 and extending through 1889 and 1891. There had been during these years considerable scandal in connection with the affairs of the bank. Money had been loaned, mortgages had been taken to secure the loans and the Board of Directors had failed to record the mortgages. Prior to the suspension of the bank, the Directors who had been heavy depositors during the existence of the bank practically withdrew their deposits. The Bill alleged that the Cashier Bowdon had withdrawn from the Bank and fraudulently converted to his own use a large sum of money, and that upon the suspension of the bank he became a fugitive from justice. It further alleged that the Board of Directors knew the Bank was insolvent for two months before its suspension, but fraudulently concealed the fact from the public and its creditors, except such depositors as the directors desired to favor. At page 227 the Court after reviewing the decision of the Supreme Court of the United States in Briggs *vs.* Spaulding, supra, says: "In the case at bar we have an essentially different state of facts to consider. The frauds and irregularities which resulted in the ruin of the bank went on through a period of more than three years, during all of which time the defendant directors were in office. Many of these irregularities were not things of secret occurrence and sudden development. They were such as must have been known to the defendants, if they gave even the most casual attention to the affairs of the bank. The embezzlement of Bowden, the $45,000 loans to the Northrops and to Kerchner, and the losses resulting, were facts that could not have eluded the most cursory attention of the directors to their duties. In respect to their omission to register the mortgages, it is a mistake to suppose that the directors of national banks cease to be such, and that their duty to the bank lapses, when an examiner is put in charge of its funds, properties, and books by the Comptroller of the Currency. It is incumbent upon them to give attention to these

affairs even more specially after the examiner takes charge than before. In the case at bar it was especially their duty to register the mortgages held by the bank from Mitchell, Boatwright, and the Northrops. Their duty was the more special and urgent in respect to these securities in consequence of the fact that the management of the affairs of the bank had been taken from its own executive officers and committed to a temporary officer appointed by the comptroller, who in all probability was unfamiliar with the registration laws of North Carolina. They were still as much the advisers of the bank examiner as they had been of the cashier, notwithstanding they were not invested by law with the control over him, which they were empowered to exercise over the cashier. It was especially the duty of the defendant directors, acquainted as they were with the local laws of registration, to see to and make certain the prompt registration of the three mortgages. Their duties as directors did not cease in these respects until after the appointment of the receiver of this bank. In respect to the action of the defendants, or some of them, in checking out their deposits two months before the suspension, in full knowledge that such an event must occur, there could be no adjudication except after plenary proofs. That depositors generally are at liberty to check out the entire funds at their credit before suspension is clear; but even they, after suspension, are entitled only to such percentage of their deposits as the assets of the bank will liquidate. If directors are depositors, and know two months or more before suspension that that event is inevitable, and that the bank can pay only a percentage of its deposits, and yet check for the whole of their own balances, thereby diminishing the percentage to which other creditors would be entitled, they certainly defraud, to the extent of the diminution, the creditors whose interest they are relied upon to protect, and should be held to strict accountability.'' This decision is upon the theory that the defendant directors were guilty of fraud.

We do not wish to be understood as taking the position that under no circumstances could the directors of a National Bank be held liable for damages resulting from bad loans made by their cashier. If the funds of the bank had been stolen or mis-

appropriated by a dishonest cashier, when, by the exercise of ordinary care, the directors could have discovered his dishonesty in time to prevent the theft or misappropriation, but had failed to exercise such ordinary care, or, notwithstanding such knowledge, had retained the dishonest official in the employ of the bank, they would be liable for the sums stolen or misappropriated by him, or, if they had trusted the business of the bank to an incompetent cashier, whose incompetency was known to them at the time of his employment, or, by the exercise of ordinary care, could have become known to them, they would, under certain circumstances, be liable for the losses made by such incompetent cashier, provided the losses occurred after the knowledge of the incompetency had been or could have been obtained,—but that is not the case here. This is not a case of misappropriated or stolen funds, or of dishonest or incompetent officials. So free was this case from any suspicion of dishonesty that the trial judge in delivering the judgment of the Court used the following language in his written opinion on file in the Superior Court in this case, and to which we now refer and beg to make a part of this brief: "I have given the testimony in this case careful consideration "and devoted much time to an examination of the law appli- "cable thereto and have arrived at the conclusion that plaintiff "is entitled to a judgment in his favor against the defendants "Thomas, Thompson and Wilson. * * * It is but "proper and just to the defendants to state that no claim was "or is made by the plaintiff that said defendants or either of "them were guilty of any fraud, collusion or direct personal "wrongdoing in their relations with said bank other than a "want of proper supervision over its affairs and its cashier. "Their personal integrity is not and has not been impeached "in any manner and there is no testimony in the case casting "any imputation on the honesty and fair dealing of either of "said defendants with the affairs of the bank. The sole and "only ground upon which the liability of the defendants is "claimed and upon which ground only the Court finds against "the defendants is that as officers of the Bank and its Exec- "utive Committee they were derelict in not paying that care

"and attention to and control over its affairs and its cashier "as was required of them by the by-laws of said bank as well "as the general law of the land and which constitutes such "negligence on their part as makes them liable to the stock-"holders for losses sustained by them."

When this case was before the Supreme Court of California, counsel for the plaintiff in the original action, John Chetwood, Jr., cited the following authorities in support of his contention that the Bill stated a cause of action, and as they will probably be relied upon here, for the plaintiff in the original action has simply used the name of the Bank to sue out this writ of error, we take the liberty of anticipating their citation :

Hun vs. *Cary*, 82 N. Y. 65.
Shea vs. *Mabry*, 69 Tenn. 319.
Brinkerhoff vs. *Bostwick*, 88 N. Y. 52.
Wallace vs. *Lincoln Savings Bank*, 89 Tenn. 631.
Delano vs. *Case*, 121 Illinois, 247.
Ackerman vs. *Halsey*, 37 N. J. E. 356.
Landis vs. *S. I. C. Hotel Co.*, 31 Atlantic, 755.
McMullen vs. *Ritchie*, 64 Fed. 253.

We will take these cases one by one and show that in every one of them the bill alleged fraud, willful misconduct or misappropriations of funds, which, by the exercise of ordinary care, the directors could have avoided, and we challenge counsel to show one single case where a suit was maintained against bank directors for money loaned by the cashier, in the absence of fraud, wilful misconduct or misappropriation of funds, or such a state of facts in the management of the bank as would put the directors on enquiry.

Hun *vs.* Cary, *supra*, was cited by Justice Harlan in the dissenting opinion in Briggs *vs.* Spaulding. The facts in that case show that the defendants were trustees of a savings bank. Under its charter the bank had power to purchase a lot for a banking house, requisite for the transaction of its business. Its Board of Directors purchased a lot when such purchase was not requisite for the transaction of its business. At the time

of the purchase the assets were insufficient to pay the debts and this fact was known to the trustees. The Court held that the purchase by them of a lot under these circumstances was unnecessary and extravagant and, that the bank having become unable to pay its depositors and having been forced to close its doors as a result of such purpose, a suit would lie against the directors for damage caused to the bank by their willful and inexcusable conduct. This is not a case of bad loans made by the cashier. This is a case of inexcusable misconduct upon the part of the directors. In Brinkerhoff *vs.* Bostwick, *supra*, in addition to the various charges of negligence against the directors, it was specifically alleged in the Bill that "they employed "a cashier who was dishonest, unfaithful and incompetent, all "of which was known to them." There is no allegation in the Bill under consideration that these defendants employed a cashier who was dishonest, unfaithful or incompetent, nor is there any allegation that any of the cashier's transactions were dishonest. Wallace *vs.* Lincoln Savings Bank, 89 Tenn. 630, is a very interesting case, and was decided by the Supreme Court of Tennessee at the December term of 1890. The suit is by a shareholder and creditor against the Directors of the Savings Bank. "The liability of the defendants to the corporation" says Lurton, J. "is predicated alone upon the pro- "position that certain losses sustained by the bank during its "fifteen years of business activity were the direct consequence "of the negligence of defendants while directors. The prin- "cipal fact constituting this alleged negligence is a charge "that the board of directors abdicated their trust by failure "to supervise the management, and turned over the entire con- "trol of the business of the bank to the unlimited discretion "and unaided judgment of the cashier; that as a consequence "the bank had sustained great losses through a series of unwise "and undefensible transactions engaged in by the cashier with- "out the aid, advice and supervision of those charged by their "selection with the duty of exercising an intelligent judgment "in the control of that officer. The allegation necessarily is "that these transactions, so disastrous in their consequences, "would have been avoided and these losses escaped but for the

"negligence and inattention of defendants in office at the dates "of the several transactions." A number of specific losses are then recited, the Court proceeds to hold that the complainant can only fix liability upon the defendants by first convicting the cashier of negligence in regard to the specific transactions alleged in the bill, and. citing with approval Bank of Albany *vs.* Ten Eyck, 48 N. Y. 305, goes on to say: "A cashier is bound to exercise reasonable skill, care and dili- "gence in the discharge of his duties. If he fails in such "skill, or omits such care, and the bank suffers damage as a "consequence, he is liable. If entrusted with the duty of mak- "ing loans, he is not responsible as a guarantor of the solv- "ency of his transactions, or responsible for an error of "judgment where he has exercised reasonable skill, diligence, "and prudence. * * * Complainant has not shown "that there was any want of care or prudence in making these "loans or in the subsequent steps taken to secure or collect "them. If the cashier is not chargeable with any want of "care or skill about these matters, then it follows that the "defendants are not liable, for they, at most, can only be lia- "ble for losses resulting from his negligence in these mat- "ters. * * * Directors, by assuming office, agree to "give as much of their time and attention to the duties "assumed as the proper care of the interests intrusted to them "may require. If they are inattentive to these duties, if they "neglect to attend meetings of the Board, if they turn over the "management of the business of the company to the exclusive "control of other agents, thus abdicating their control, then, "they are guilty of gross negligence with respect to their "ministerial duties; and if loss results to the corporation by "the breaches of trust or acts of negligence committed by those "left in control, which by due care and attention on their part "could have been avoided, they will be responsible to the cor- "poration. * * * * Bank directors are not expected to "give their whole time and attention to the business of the bank. "The customary method in regard to such associations is that "the active management and responsible custody is left to the "cashier and other agents selected by the directors for that

" purpose. These are paid salaries, demanding their skill and " time should be given to the duties of immediate management. " As a rule, the custodian of the assets is the cashier. The " duty of directors with respect to such is to supervise, direct " and control. These agents though usually selected by the " directors are not the agents of the directors but agents " of the corporation. The neglect which would render " them responsible for not exercising their control and direction " properly must depend upon the circumstances of each par- " ticular case. *They are not insurers of their fidelity and they are* " *not liable for their acts on any principle of the law of agency.*" Delano *vs.* Case—*supra,* cited also in the dissenting opinion in Briggs *vs.* Spaulding, was a suit by a general depositor of a bank against directors of the bank for damages in permitting the Bank to be held out to the public as solvent, when in fact at the time it was insolvent, and such insolvency known to the directors, and upon the strength of which false representations the plaintiff became a depositor and lost his money. Ackerman *vs.* Halsey, *supra,*—also cited in the dissenting opinion in Briggs *vs.* Spaulding—was a bill filed by a creditor and stockholder of a national bank against the directors. The bill alleged that the directors caused reports of the condition of the bank to be published from time to time; that these reports stated in substance that the capital was unimpaired and that the bank had a large surplus over and above the payment of its debts and liabilities and was in a sound and solvent condition, while in fact it had no surplus for several years before its failure and was insolvent, and that the complainant relying upon the truth of these reports had purchased the stock. It then alleges that certain of the funds of the institution had been abstracted and misappropriated by the cashier, who abstracted and misapplied the assets of the bank exceeding the sum of Two Million Dollars, which completely ruined the bank; that the directors did not honestly and diligently administer the affairs of the bank but suffered and permitted its money, property and effects to be in the possession and under the control of dishonest and incompetent persons and permitted the moneys to be stolen, wasted and

squandered. The bill then goes on to specify false and fraudulent entries in the books readily detectible amounting to Six Hundred Thousand Dollars. In Shea *vs.* Mabry, *Supra*, the following is from the opinion of the Court: "Directors of "corporations are not mere figureheads; they are trustees for "the company, for the stockholders and for the creditors. "They must not only use good faith but also care, attention "and circumspection in the affairs of the corporation and par- "ticularly in the safe keeping and disbursements of funds "committed to their custody and control. *They must see "that the funds are appropriated as intended to the purposes "of the trust; and if they misappropriate them or allow others "to divert them from these purposes, they must answer for it "individually. Ignorance will not excuse them when they have "the means of knowledge.*" That suit was brought by a judgment creditor of a corporation against the members of the Board of Directors, and the bill alleged that they had misappropriated the funds of the corporation in bribing and corrupting the State Legislature, and had squandered and embezzled various sums of money belonging to said corporation. The cases, Landis *vs.* S. I. C. Hotel Co., *supra*, and McMullen *vs.*. Ritchie, *supra*, are dissimilar from the one at bar. In the former case, which was a suit by a stockholder to hold certain directors liable for the value of plaintiff's stock and also for certain moneys advanced by him to the corporation which it had failed to repay, the bill charged that the defendants were directors of a corporation formed to build a hotel, and purchased for its site from themselves the equitable title to a portion of a tract of land at a two hundred per cent. profit to themselves and subsequently manipulated the legal title so as to render the land unavailable for the purpose of raising a loan by mortgage, and when only $25,000 in stock had been subscribed they contracted on the part of the corporation for the erection of improvements involving an outlay of $90,000, in order to themselves realize a profit from the sale of the remainder of the land. On the insolvency of the corporation they virtually became the owners of the land and improvements, leaving nothing for the stockholders. In the latter case,

which was in the nature of a creditor's bill, it was held that the President of a corporation for whom no salary is provided, cannot recover such salary or personal expenses connected therewith for which he had no purpose to charge at the time he assumed office.

2.

IF ANY CAUSE OF ACTION EXISTED IN FAVOR OF THE CORPORATION, IT WAS AGAINST THE DEFENDANTS FOR FAILURE TO PERFORM THEIR DUTIES AS DIRECTORS, NOT FOR FAILURE TO PERFORM THEIR DUTIES AS MEMBERS OF THE EXECUTIVE COMMITTEE.

a.

A Board of Directors cannot delegate its general powers of supervision of the affairs of a corporation to a sub-committee so as to divest itself of liability for breach of its obligation to supervise the corporate affairs.

As a general rule, the powers of a Board of Directors of a corporation cannot be delegated except under an express grant of authority. In the case at bar it cannot be claimed that there was any express grant of authority in the National Banking Laws or in the Articles of Incorporation which authorized the Board of Directors to divest certain of its members from liability by delegating its powers and authority to a sub-committee of three. A Board of Directors has implied authority to appoint a committee of its number with authority to exercise general control over the affairs of the corporation during recess of the Board, and a sub-committee can always be appointed for some special purpose. For instance, the Directors of a Bank may authorize the President or the President and Cashier to borrow money and to draw and endorse negotiable paper in the name of the corporation.

Fleckner vs. U. S. Bank, 8 Wheat 338.
Spear vs. Ladd, 11 Mass. 94.
Merrick vs. Bank, 8 Gill. 59.

And the Board of Directors of a Bank may also delegate to any of their own members authority to mortgage and sell real estate belonging to the Company.

Burrill vs. Nahant Bank, 2 Metcalf 163.

Hoyt vs. Thompson, 19 N. Y. 207.

"Those powers of the Directors of a corporation which it is intended they should exercise personally, can in no case be delegated. The general supervision and direction of the affairs of a corporation are especially entrusted by the shareholders to the Board of Directors; it is upon the personal care and attention of the Directors that the stockholders depend for the success of their enterprise. It follows that authority to delegate these general powers of management cannot be implied." Morawetz on Corporations, Second Edition, Sec. 536. Assuming that the By-Law was an attempt upon the part of the Board to delegate its authority to three of its members and divest itself of liability, then, the Board of Directors had no power to pass such a By-Law, and it was absolutely void, and no action can be maintained to recover damages against the members of a body created by a void By-Law.

We do not claim, however, that the Board of Directors could not clothe the Cashier of the Bank with powers to carry on the business of the corporation, for as we shall see hereafter when we come to discuss the Findings that was exactly what was done, and it was done under subdivision seven of Section 5136 of the Revised Statutes, but we simply claim that it could not shift any responsibility that may have resulted from clothing the Cashier with that power to the shoulders of a sub-committee.

b.

Assuming, that the By-Law was not a delegation of the powers of the Board of Directors, but was only in line with the Board's authority to expedite the business of the corporation by appointing sub-committees who should attend to details and report to the Board for action, then said By-Law was valid and the members of the Executive Committee, appointed under its authority, were the agents of the Board of Directors. The

plaintiff being a stockholder of the corporation was bound to take notice that the Executive Committee was the agent and the Board of Directors the principal, and commence his action against the latter. Under Section 2343, Civil Code of California, there are only three cases in which an agent is liable to third persons, and this case we submit does not come within one of the cases set forth in that section, which reads as follows:

"One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:

1. When, with his consent, credit is given to him personally in a transaction;

2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or,

3. When his acts are wrongful in their nature."

3.

THE BILL FAILS TO ALLEGE THAT THERE ARE ANY OTHER STOCKHOLDERS IN THE CORPORATION OTHER THAN THE PLAINTIFF IN THE ACTION AND THE THREE DIRECTORS SUED.

Section 382 of the Code of Civil Procedure of the State of California is as follows: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all."

It will be observed that before one can bring suit on behalf of a numerous body of persons similarly situated, there must be one of two sets of facts existing; either that the question involved is one of general interest to many, or that the parties

who should unite with the plaintiff are so numerous that they cannot be brought before the Court. The averments in the Bill are simply that at the time this corporation was organized, the whole of the $200,000 worth of stock was subscribed for by divers persons, to-wit: more than one—that is the dictionary definition of the word "divers," more than one, several, —and that Chetwood became and has always remained the owner of twenty shares. He sues the other three parties who were shareholders, members of the Board of Directors and of the Executive Committee. There is no averment in the Bill that the question involved is one of interest to many, and there is no averment that the parties are numerous and cannot be brought before the Court. The rule in regard to that section is, that not only must those facts exist, but they must be stated in the Bill. A party cannot justify the bringing of a suit of this character without stating in his Bill facts which bring him within that provision of the Code, and if he does not state facts that bring him within that provision of the Code, he has not the right to bring the suit.

Pomeroy's Remedies & Remedial Rights, Sec. 390.
Barstown R. R. Co. vs. Metcalf, 4 Metc. (Ky.) 199.
Carey vs. Brown, 58 Cal, 183.

There might be cases imagined in which a stockholder, upon the facts alleged, would be justified in bringing a suit for and on behalf of the corporation, and in which a judgment running in favor of the corporation would be maintained, notwithstanding an averment that the parties were not numerous; but, unfortunately for the plaintiff in the original case, his Bill has left him without that protection. The National Banking Act provides that upon it being reported to the Comptroller of the Currency that a bank is insolvent, he shall examine into its affairs, and if upon such examination, he finds the condition of things to be as specified in the Act, then, he shall declare the Bank insolvent and appoint a receiver to wind up its affairs, and that the receiver shall proceed to wind up the business of the corporation. In other words, while they do not then and there dissolve the corporation, they wind up and close its business, which is, in practical effect, a dissolution. That being the

Banking Act,--the law governing the life of this corporation, —the plaintiff has alleged in his Bill that after having realized upon all the assets of the corporation, and exhausted them in payment of claims, it became necessary to levy an assessment, which the Banking Act authorizes; that this assessment was levied; that $55,000 was paid in under the assessment; and with that money, in addition to what had otherwise been received, the receiver paid all the debts of the corporation. (Trans. 21.) These averments are to the effect that the business of the corporation had been closed. Now, in the absence of an averment in the Bill that there are other shareholders interested beside the plaintiff and the defendant, for whose benefit then could any judgment have been rendered in the action? In other words, the ultimate result and the practical result of the judgment which was ordered by the Court in this case, was to decree that the three defendants owning,-- if our construction of the pleading is correct,--1980 shares of the 2000 shares constituting the capital stock, should pay $400,000—the amount sued for--for the benefit of themselves and the plaintiff. There was no one else to whom the proceeds of this judgment could go but the plaintiff and the defendants. Under this Bill, a judgment was asked for against the defendants for their own benefit, and we venture to say that such a judgment has never been heard of before and probably will never be heard of again. It may be claimed that as the Bill alleges that seven Directors had been elected at the annual meeting prior to the commencement of the action, that that allegation might be sufficient to show that there were at least four stockholders other than the plaintiff and the three Directors sued in the original action; but for all that appears in the Bill, the four gentlemen, who were elected Directors at such annual meeting, may have parted with their stock and ceased to have been either shareholders or Directors immediately thereafter.

4.

THE BILL FAILS TO SHOW THAT THE PROPER DEMAND TO SUE HAD BEEN MADE UPON THE CORPORATION AND THE OFFICERS IN CHARGE OF IT, AND IS THEREFORE FATALLY DEFECTIVE.

The Bill fails to show that any demand was made upon the Comptroller of the Currency of the United States to have the Receiver commence this action. It does appear that a demand was made upon the Receiver himself to bring the suit and that a demand was made upon the Comptroller of the Currency of the United States, as such official, to bring the suit, but the Comptroller could not bring the suit in his own name. The bank was in the hands of a Receiver and the Receiver could not bring the suit without the authority of the Comptroller. It was necessary to request the Comptroller to have the Receiver bring the suit.

In the case of Swope *vs.* Villard, 61 Fed. page 417—Circuit Court, S. D. New York,—the Court held that a stock holder of a corporation which is in a receiver's hands has no right to sue upon a cause of action in favor of the corporation upon the mere refusal of the receiver to sue on the stockholder's request, without showing that he has asked the Court that appointed the receiver to direct him to sue. The receiver in the case at bar had no more power to sue the directors of the corporation without special authority thereto from the Comptroller, than the Receivers appointed by the Court in the case above cited at bar to sue without authority of the Court. Section 5234 Revised Statutes provides that the Receiver "*under the direction of the Comptroller* shall take possession of the books, records and assets of every description of such Association; collect all debts, dues and claims belonging to it &c." The Bill further fails to show that any proper demand was ever made upon the Board of Directors to commence this action. To quote again from the opinion in Swope *vs.* Villard *supra*: "If now, it be assumed that for any reason the receivers were not, by their appointment, vested with the power to enforce the alleged cause of action, then the railroad company was the proper party to sue; and upon this assumption the allegations of the bill do not justify action by the complainant in its stead. All that is alleged in this regard is that plaintiff has requested the directors to sue, and they have neglected and refused to do so. * * * * The bill does not show when or how the request to sue was made, nor

upon what showing of facts, nor whether the persons who then composed the Board of Directors still continue in office. Only a minority of the board is charged with the wrongs asserted. * * * * For these and other reasons, even upon the assumption that the power of the Directors in the premises were not suspended by the receivership, the bill does not seem to me to satisfy the requirements of the rules laid down in Hawes *vs.* Oakland, 104 U. S. 450, and similar cases. It does not appear that the complainant 'exhausted all the means within his reach to obtain within the corporation itself, the redress of his grievances or action in accordance with his wishes.'"

But there is another fatal defect in the Bill; there is no allegation anywhere in the amended bill that plaintiff obtained the leave of the Comptroller to sue the Receiver. If it be held that that was unnecessary, then, clearly, he could not sue the Receiver until he had obtained leave of the Court in which the case at bar was pending, to make the receiver a party to the action. The Receiver was an indispensable party. Upon this subject, we again quote the opinion of Swope *vs.* Villard, supra: "Another fatal defect of the bill is that it does not show that the court which appointed the receivers has given the complainant leave to sue them. If the effect of the appointment of the receivers was such as appears from the bill, and was assumed or conceded on the argument, these receivers are indispensable parties; and the decision of the Supreme Court in Porter *v.* Sabin, 149 U. S. 478, 13 Sup. Ct. 1008, is conclusive. In that case, after a receiver of a corporation had been appointed by the state court, plaintiffs requested him to sue its president and auditor for money and property lost by their mismanagement. This request was brought to the attention of the Court, and being opposed by a majority of the stockholders, was denied. Then plaintiffs began their suit in the federal court, and applied to the state court for leave to make the receiver a party, and this applicaton was denied; and this was shown in the amended bill. Upon demurrer this bill was dismissed. Justice Gray, delivering the opinion of the Supreme Court, says: 'Any claim against the receiver of a corporation the

court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver, without the permission of the Court which appointed him. Barton *v.* Barbour, 104 U. S. 126; Railroad Co. *v.* Cox, 145 U. S. 593, 601, 12, Sup. Ct. 905.' It is argued that the necessity for obtaining such leave of court is dispensed with by section 3 of the act of August 13, 1888 (U. S. Rev. St. Supp. 613), which provides as follows: 'That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed.' No act or transaction of the receivers is involved in this suit, unless it be their refusal to sue as requested. In my opinion, that is not an act or transaction of theirs in carrying on the business within the meaning of this statute."

If plaintiff's theory is correct that the Comptroller of the Currency should bring the suit, and we suppose his demand upon the Comptroller of the Currency to bring the suit is in line with that theory, for the law never presumes that a person will do a vain and empty thing, then, the Comptroller of the Currency is not a party to this action, and we have a case of a judgment rendered here in a suit in which a necessary party was not brought into Court.

B.

THE CASE FOUND BY THE FINDINGS IS NOT THE CASE PRESENTED BY THE PLEADINGS.

To the Bill an answer was interposed by the defendants Thompson and Wilson, which by stipulation was to stand as

the answer of the defendant in error and the Bank (Trans. 57). The answer (Trans. 46) denies that the members of the Executive Committee or any of them ever assumed or had any other supervision of the officers and business of the corporation other than that imposed by Section 7 of the By-Laws or that they ever had any duties to perform other than that set out in said Section 7 of the By-Laws; then sets up Section 19 of the By-Laws which defines the duties and powers of the Cashier, and Section 24 of the By-Laws which provides for the appointment and duties of another sub-committee of the Board of Directors to be known as the Auditing Committee; then alleges the appointment of this latter Committee upon the organization of the Bank and its existence during the period the Bank remained in business. The answer then denies specifically all the allegations of negligence set out in the amended bill and sets up generally that the members of the Executive Committee acted with ordinary care and prudence in the management of the affairs of the Bank. The Findings find as facts all the facts alleged and not denied and find upon various evidentiary matters which are not usually included in findings and fail to find upon various material issues arising under the pleadings, but as this is an appeal from the judgment on the judgment roll alone, we understand that we are precluded from claiming that material issues are not found upon and are limited as regards these issues to the proposition that the findings do not support the judgment, which proposition we will discuss hereafter. In the Bill, under which the case was tried, an action for damages against the three members of the Executive Committee for neglecting their duties under a By-Law was presented. In the findings we have an action for damages against the President of the Board for failing to do something the Board of Directors should possibly have done, but which the Bill always claimed the Executive Committee should have done. A careful reading of the Bill will show its theory to be that the members of the Executive Committee are liable for the bad loans made by the cashier. A joint and several judgment is asked against them, not a several judgment against defendant in error. The Bill

alleges that (Trans. 10) "*as such Executive Committee*, said three persons, Richard P. Thomas, Robert R. Thompson, and Robert A. Wilson, immediately upon their said election and appointment as such committee assumed the discharge of the duties thereof and in due performance of their duties had from said date of their first appointment in October, 1886, continuously until the failure of said corporation, which is hereinafter mentioned, the immediate supervision of all the officers and business of said corporation; on the said three persons the above named defendants, Thomas, Thompson and Wilson *as such Executive Committee* devolved, and continuously remained throughout all of said time, the duty to exercise immediate supervision of all the officers and business of said Bank. (Trans. 11.) * * * * That it was the duty of each of said *members of the Executive Committee*, to exercise concurrently with his associates on said committee, diligence and fidelity in performing the duties of said Committee as above detailed." (Trans. 12.) Then after alleging the bad loans by the cashier, aver that "defendants Thomas, Thompson and Wilson utterly neglected their duty in the premises and wilfully neglected to take any care or exercise any supervision of the officials and business of the Bank, but negligently permitted the said Cashier to do as he pleased with and misuse, waste and lose the moneys of the Bank, & by reason of their negligence & omissions of defendants Thomas, Thompson and Wilson, and not otherwise, each and all of the said losses of the corporation occurred." (Trans. 19.) Then after alleging that a large profit would have been made, if the Cashier had been more fortunate in his investments, avers that all these prospective millions were "lost by the aforesaid improvident loans &c of the Cashier and the aforesaid negligence of defendants Thomas, Thompson and Wilson." (Trans. 19.) We do not know what the character "&c" stands for in the above connection. Perhaps the unfortunate Cashier had committed some other offenses which the learned pleader who drafted the Bill thought it wiser to leave to the imagination of the Court. The old rule of definiteness in a pleading does not appear to have cut much figure in the drafting of the Bill in

question, which then goes on to lay the closing of the Bank's doors to "the negligence of said defendants and the acts and misconduct of the Cashier." (Trans. 19.) The last allegation in the Bill on this subject is as follows:—"That the defendants Thomas, Thompson and Wilson are financially responsible and able to make good the losses which have resulted to said corporation by reason of their said negligence, and a judgment against them for the entire amount of such losses can be made and collected. (Trans. 21.)

Looking at it from every point of view the conclusion must be reached that this is a suit against the members of the Executive Committee for damages for negligence, not a suit against the President or the Vice-President for negligence as President or Vice-President. True the complaint sets out the By-Laws providing for the duties of those two officers, but it was surplusage to include them in the Bill as it is nowhere alleged in the complaint that either the President or Vice-President failed to perform those duties. Damages were asked against the defendant in error for failure to peform his duty as a member of the Executive Committee. In his answer he denied that he had been remiss in that regard, and that was the only issue at the trial. If A is the President and Secretary of a corporation, and he is sued in damages for negligently failing to perform his duties as Secretary, he cannot in that action be adjudged liable in damages for negligently performing his duties as President. And yet that is exactly what has been done in this case. The main issue,--the controlling issue in this case,—as to whether the Executive Committee were or were not negligent in letting the Cashier make loans, is not only not found upon, but not even hinted at in the Findings. The question of whether Thompson and Wilson were negligent is not touched upon, but, it is found that Thomas as President of the Bank had the supervision of its affairs and that *as such President he was negligent*, and as a conclusion of law finds that he is responsible for every dollar loaned by the Cashier. Not a single material issue arising from the pleadings is found upon in the Findings. There are findings upon various allegations in the Bill admitted in the answer, and the balance of the Findings

is entirely outside of the issues of the Pleadings. An examination of the Judgment Roll will probably disclose why the negligence was shifted from the shoulders of the Executive Committee in the complaint to the shoulders of the President in the Findings, and why there was no finding upon the negligence of the members of the Executive Committee. The Sixteenth subdivision of the Findings reads as follows :—(Trans. 87.) "From the defendants Robert R. Thompson and Robert A. Wilson—of, for and on account of said loss,—there has, in this action been collected the sum of Twenty-seven thousand five hundred,—($27,500) Dollars; leaving a net loss to the Bank, of the sum of One hundred and thirty-nine thousand four hundred and nineteen,—($139,419) Dollars." Turning to the transcript we find that this case went to issue in June 1893 (Trans. 57), was subsequently tried, and thereafter and on the 27th day of April, 1894, the Court rendered its decision awarding the plaintiff a judgment against the defendants Thomas, Thompson and Wilson, and ordering the appointment of a Referee to state an account (Trans. 58); that said Referee was appointed in June following (Trans. 60), and on August 17, 1894, reported that there was due to the Bank from the persons named in the order of reference on the day the Bank suspended (December 15, 1888) the sum of $197,-092.91. (Trans. 61–63.) In less than one month afterwards, after the decision of the Court had been rendered awarding this plaintiff a judgment for the benefit of the corporation, and after the report of the Referee had been filed fixing the amount of that judgment, the plaintiff files stipulations in Court (Trans. 64-66) renouncing and withdrawing his cause of action against defendants Thompson and Wilson, and consenting that a judgment of dismissal be entered as to them. Thomas was not a party to these stipulations. On September 24, 1894, in accordance with these stipulations, judgment of dismissal was entered as to Thompson and Wilson. (Trans. 67-69). The findings, which were not filed until November 20th, although the Court had awarded judgment on April 27th and the Referee had reported the amount of the judgment on August 17th, were silent as to

the negligence of Thompson and Wilson, but very eloquent as to the negligence of the President. In the meantime Thompson and Wilson had paid $27,500, less than one-seventh the amount found lost to the Bank, and the remaining Six-Sevenths was saddled on to Thomas.

It is a well settled rule that where the case found by the Findings is different from the case presented by the Pleadings, judgment will be reversed, and this will be done although the plaintiff had a good cause of action, and is entitled to relief substantially as decreed and could have amended the Bill so as to conform to the proofs and correspond with the Findings.

Bryan vs. *Tormey*, 84 Cal. 126.

It is also well settled that in an action on a contract the complaint must show the breach, or it states no cause of action which will support the judgment on appeal.

Curtiss vs. *Bachman*, 84 Cal. 216.

And the objection that the pleadings do not support the judgment may be taken on an appeal from the judgment on the judgment roll alone.

Putnam vs. *Lamphier*, 36 Cal. 151.

C.

THE FINDINGS DO NOT SUSTAIN THE JUDGMENT.

I.

THE FINDINGS AFFIRMATIVELY SHOW THAT THE PRESIDENT DID NOT HAVE THE GENERAL SUPERVISION OF THE AFFAIRS OF THE BANK, AND COULD NOT THEREFORE BE RESPONSIBLE FOR THE ACTS OF THE EMPLOYEES.

The findings set out Sections 7, 17, 18, 19 and 24 of the By-Laws under which it is claimed that Thomas alone is liable for the bad loans made by the Cashier. Section 7 we have already set out in full. Section 18 regulates the duties of the

Vice-President, which are not material on this discussion, sec-17 regulates the duties of the President, Section 19 the duties of the Cashier, and Section 24 the duties of the Auditing Committee. (Trans. 71–76.)

After setting out these By-Laws, the findings find as a fact that these By-Laws imposed upon the President alone "the duty of seeing that the money of said Bank was not wasted or misused" and the duty "to use his own skill and discretion in conducting the affairs and business of the Bank." (Trans. 77.) This, at the best, is not a finding of fact. The finding itself shows that it simply is the opinion of the Judge who signed them that the By-Laws impose that duty, because it finds that defendant in error "took, assumed and had general control and supervision of the affairs of the Bank with authority and power as set forth in said By-Laws." (Trans. 77.) We submit that the By-Laws incorporated in the findings show that he did not have the general control and supervision of the affairs of the Bank and that the conclusion drawn by the Court that he did have, is not warranted by the By-Laws which, it is found, alone gave him that authority. The By-Laws having been set out in the findings, the Court's view of the duties imposed upon its officers by such By-Laws is a legal inference and not a fact, which has no place in the findings. From these By-Laws it appears (Section 7) that the Board of Directors was authorized to appoint an Executive Committee "who shall have and exercise immediate supervision of all the officers and business of this Bank. * * * * Who shall have power to discount and purchase bills of exchange, coin and bullion and loan money on personal security," and although it is not found in the findings, it is alleged in the Bill and admitted in the answer that said Executive Committee was appointed in pursuance of said By-Law and consisted of the defendant in error and Thompson and Wilson, who assumed the duties of their office, and remained in office until the Bank suspended. Section Seventeen (Trans. 72-74) provides that "the President shall have general control and supervision of the affairs of the Bank. * * * * He shall have power and authority to discount bills, notes and other evi-

dences of debt and make loans not exceeding $10,000.00 to any single individual, firm or corporation; buy and sell bills of exchange; sign certificates of deposit and draw warrants and checks upon the Bank." But Section 7 had already given immediate supervision to the Executive Committee. The power to appoint the officers is solely with the Board of Directors. That is regulated by Section 5136 Revised Statutes. The power of removing the officers was not given to the President; he could suspend them for cause but had to report his action and the occasion thereof to the Directors. (Trans. 74). His duty to make loans was limited to $10,000 to any single individual (Trans. 72) while the power of the Executive Committee to make loans is unlimited (Trans. 72). That he did not have supervision of the Cashier and that his office was entirely independent of the Cashier's is shown by reference to Section 19, which sets forth the duties of the Cashier. (Trans. 74-76). The Cashier could make loans under the same restrictions as the President (Trans. 75), and he alone had the custody of the evidences of indebtedness and securities of the Bank and the moneys belonging to the Bank, and could deliver them only upon the order of the Board of Directors. (Trans. 76). It is clear from reading these By-Laws that the general supervision of the Bank rested with the Board of Directors; that the Executive Committee was given the immediate supervision of the officers and business of the Bank but had to report to the Board at each regular meeting, and that the President was given general supervision of the affairs of the Bank, but he was required to report to the Board and he had nothing to do with the officers except to suspend them for cause. The general supervision of all the employees of the Bank having been given to the Executive Committee by a previous Section, the general supervision could not be given to the President by a subsequent Section as attempted in Section Seventeen. (Trans. 72-74).

2.

THE FINDINGS ARE FATALLY DEFECTIVE IN THAT THEY FAIL TO SHOW THAT THE CASHIER WAS NEGLIGENT, AND BEFORE THE DEFENDANT IN ERROR COULD BE HELD LIABLE FOR DAMAGES RESULTING FROM THE NEGLIGENCE OF AN EMPLOYEE, NEGLIGENCE OF THAT EMPLOYEE MUST BE SHOWN.

The duties of the Cashier are set forth as we have seen in Section 19 of the By-Laws. He could have had no other duties for the Banking act provides that the Board of Directors shall employ him and specify his duties, and the act of the Board is the By-Law specifying those duties Under Section 19 (Trans. 74–76) he was to keep a record of all proceedings of the meetings of the Directors and stockholders. There is no finding that he did not do so. He was required when requested by the President or two Directors to cause notice to be given of all meetings of the Board of Directors and of the stockholders. There is no finding that he did not do so. He was to countersign all certificates of stock; all receipts for circulating notes received from the Comptroller of the Currency, and he was to promptly and accurately prepare and forward all reports and perform all acts required by the laws of the United States or regulations of the Treasury Department. There is no finding that he failed in any of these requirements. He was to sign or countersign and when necessary affix the seal of the Bank to all contracts, deeds, evidences of debt and other instruments in writing which were necessary and proper in the transaction of the ordinary business of the Bank, or which had been approved by the Board of Directors and to do all acts required by the Board. There is no finding that he was deficient in this regard. He was required to keep the stock certificate book and transfer book and see that the proper entries were made therein. There is no finding that he did not do so. He was to have supervision and custody of all records, minutes, papers, books, vouchers, notes, bonds, evidences of indebtedness and securities of the Bank unless otherwise specially directed by the Board of Directors and

he was to be responsible for all moneys, funds and valuables belonging to or deposited with the Bank and was required to account for and deliver the same upon order of the Board of Directors, or to any person authorized to receive them. It is not found that he violated this provision of the By-Law. He was to make such statements of the condition, finances and business of the Bank to the Directors and stockholders as might from time to time be required by the President or Board of Directors of him. It was not found that he ever failed to make such statements when required. He was to give bonds with security to be approved by the Board of Directors in the sum of Ten Thousand Dollars for the faithful discharge of his duties. It is not found that he failed to do this. Then comes the only other duty imposed upon him by the By-Law. He might—you will notice the language is permissive—the word "may" is used—under the direction and with the concurrence of the President discount bills, notes or other evidences of debt and make loans under the same restrictions as the President; issue and sign certificates of deposit and draw checks and warrants upon the Bank in the ordinary and usual course of its business and pay the current expenses of the Bank when approved by the Executive Committee.

Here are the findings in reference to the acts of the Cashier: Sub. 5—"By reason of said neglect of the President, the said Cashier, without the direction or the attempted direction of the President, Vice-President, Executive Committee, or any or either of them, loaned out the moneys of the Bank in large sums to divers irresponsible persons with no adequate security, and bought unsecured and valueless bills and notes and made loans on informal promises and pretended securities of little or no value." (Trans. 81.) It does not affirmatively appear from this finding that the Cashier knew that the parties he was dealing with were irresponsible or that the security was inadequate or that the bills and notes bought by him were unsecured and valueless. What the finding means by "informal promises and pretended securities of little or no value" is something we do not exactly understand. It does not appear who made the "informal promises," and it does not appear

that the fact that "the securities were of little or no value" was known to the Cashier. There is nothing in this finding inconsistent with the conclusion that the Cashier was acting in the ordinary course of business, and as a competent and skilled officer of the Bank, exercising his discretion in making loans on personal security, which character of loans is expressly permitted by the Seventh Subdivision of Section 5136 of the Revised Statutes. The way a commercial bank usually makes money is by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt and by "loaning money on personal security." He was not required to take a mortgage whenever he loaned money. That would have defeated the purposes for which the bank was organized.

Subdivision Eight of the findings is in reference to a transaction had with the Alameda County Railroad Company, a client of the Bank, through its President J. H. Woodard. That part of it which concerns the Cashier is as follows: "He, the said Woodard, offered to said Cashier at different times between May 7th, 1888, and the failure of said Bank, his drafts to a large amount on one Daniel Macauley who was a person of no financial standing; said drafts were not secured; to buy said drafts was entirely inconsistent with banking principles, reckless and wrong; but the said Cashier bought said drafts, these drafts were dishonored and not paid and by reason of the premises the Bank lost $68,500." It does not appear affirmatively from this finding that the Cashier knew that Daniel Macauley, the drawee, was a person of no financial standing, and even if that fact did affirmatively appear from the finding, it would not show negligence upon the part of the Cashier, unless it is also found that the Cashier knew Woodard to be insolvent. Woodard was a client of the Bank, and, in discounting his drafts, the responsibility of the drawer cuts some figure in the transaction. The finding that the drafts were not secured, does not show any negligence upon the part of the Cashier, for, as we have seen, the National Banking Law especially provides that loans may be made on personal security and none of the By-Laws of this Company prohibited the making of loans on personal security. The finding that the pur-

chase of these drafts was "inconsistent with banking principles, reckless and wrong," in the light of subsequent events, might have been so construed, but there is nothing to show that, at the time the transaction took place, the purchase of the drafts was "inconsistent with banking principles;" then, the conclusion in the finding that because the drafts were dishonored and not paid, the Bank lost the amount of the drafts, appears to us a very violent presumption. The finding fails to show that any legal measures were ever resorted to for the collection of the drafts or that they could not be collected by the ordinary legal measures.

The Ninth Subdivision of the finding refers to a transaction with one Gutman who, it is found, offered the said Cashier his drafts for large sums aggregating $67,000.00. The circumstances surrounding the Cashier's connection with this particular transaction, are found as follows: "The drawee was irresponsible, said drafts were dishonored, and they were dangerous and the purchase thereof was inconsistent with good banking, but the Cashier bought them. They were dishonored, only $15,000 could be realized upon them and the balance due thereon was entirely lost to the Bank." It does not affirmatively appear from this finding that the drawer was irresponsible. The early portion of this finding describes him "as a person of no good financial standing and as an unsafe borrower." "No good financial standing" probably means that he had some financial standing, and an "unsafe borrower" conveys rather a shadowy impression. It also appears from this finding that the drafts, which were for $67,000, were dishonored, but that $15,000 could be realized upon them. Does it mean that this $15,000 was paid after they were dishonored? If so, the learned counsel for Mr. Chetwood, who drafted these findings, is drifting away from his theory. He sued the Executive Committee as guarantors whose liability attached on the breach, and in this finding he only attempts to hold defendant in error for what could not be realized upon the drafts. "Consistency thou art a jewel!" It also affirmatively appears from this finding that "the drawee was irresponsible; said drafts were dishonored and they were dangerous." What was danger-

ous? The drawee or the drafts, and how did the danger arise and who did it affect?

Subdivision Ten of the findings refers to a transaction with one Wickham, who it is found "borrowed of the Bank by connivance with the Cashier, divers large sums of money on promissory notes, over-drafts, drafts and acceptances, to an amount aggregating more than $45,000." It does not appear that the Cashier received any portion of this money for himself or that he benefitted in any way by the loan. We usually use the word "connivance" in reference to some transactions which could not bear investigation. We submit that the connection in which it is used in this finding, is improper; but how did the Cashier connive? It does not appear that the promissory notes were not good notes. It does not appear who signed them. Rothchild may have been the maker for all the finding shows on the subject. The finding then goes on to show that "almost all the indebtedness of said Wickham was unsecured and no considerable part of said indebtedness could be recovered and the Bank lost by these transactions about $45,000," but the whole transaction amounted to but $45,000. If any part at all of it could be recovered, ought not the Cashier and the Executive Committee to get the credit of it? Then, it appears that a portion of the indebtedness was secured, but it fails to find that the securities have been sold and realized nothing.

These are all the findings in reference to the negligence of the Cashier. He is mentioned however, once or twice afterwards in Subdivision Thirteen (Trans. 86), where it is found that Thomas "negligently permitted said Cashier to do as he pleased with, misuse, waste and lose the said moneys of the Bank and by reason of the aforesaid negligence of said President and said action of the Cashier so negligently permitted and the said loss of money resulting therefrom," the Bank failed, and in Subdivision Seventeen, the loans made by the Cashier are referred to in this way: (Trans. 88) "the said Comptroller by reason of the aforesaid misuses and waste of funds by the Cashier was unable to realize" &c. We submit that there is nothing in any of these findings that show a

neglect of duty upon the part of the Cashier. In passing By-Law Number 19, the Board of Directors virtually gave the Cashier the control of discounting notes and making loans, and they had full power to do so. The case of Briggs *vs.* Spaulding, *supra*, decided that, under the amendment of 1874 to the Revised Statutes, which permitted the business of the Bank to be carried on through the Board of Directors, "or duly authorized officers or agents," the Board was justified in giving the Cashier the power to make loans.

3.

THE FINDINGS ARE FATALLY DEFECTIVE IN THAT IT DOES NOT AFFIRMATIVELY APPEAR THEREFROM THAT THE PROPER DEMAND HAD BEEN MADE BY THE PLAINTIFF STOCKHOLDER BEFORE THE COMMENCEMENT OF THE ACTION.

There is a finding, Finding 18, (Trans. 88) that, "The plaintiff herein prior to the commencement of this action, in due form requested said corporation, its Board of Directors, the said Receiver appointed to take charge of said insolvent bank, and the Comptroller of the Currency for said corporation to bring suit against said Executive Committee and the several members thereof; the above named defendant herein, for the amount of money which the said corporation lost by reason of the failure of said bank resulting from the negligence of said Committee and its members; and the said corporation, its Board of Directors, the said Receiver and Comptroller, each and all refused to bring any suit or legal proceedings in the premises," but we have seen that such demand did not authorize the bringing of the action. Before any judgment could be entered in this action the Findings had to show affirmatively, that prior to the commencement of the action the plaintiff made a demand upon the Board of Directors to commence the suit, naming the time and place where such demand was made. It should also have affirmatively appeared that he had requested the Comptroller to have

the Receiver commence the action. As we have seen, it was idle for him to ask the Comptroller to commence the action himself for he was not the proper party, and it was idle to ask the Receiver to commence the action for he could not do so without the consent of the Comptroller. He might possibly have excused himself if some Court having jurisdiction had ordered him to commence the suit, but there is no finding that such an order was made by any Court. The Findings also fail to show that any leave was ever obtained by this plaintiff to sue the Receiver even from the Court in which this action was pending or from the Comptroller.

4.

ASSUMING THAT THE CASHIER WAS WILFULLY NEGLIGENT AND THAT THE PRESIDENT HAD GENERAL SUPERVISION OVER HIM, THE FINDINGS ARE FATALLY DEFECTIVE IN THAT THEY FAIL TO SHOW THAT THE PRESIDENT HAD KNOWLEDGE THAT THE CASHIER WAS MAKING LOANS TO IRRESPONSIBE PERSONS OR UPON INADEQUATE SECURITY.

This proposition we have discussed at length under the heading "the complaint fails to state any cause of action against the appellant." The Findings have not helped the Bill in this regard. They fail to show that the defendant in error knew that the Cashier was making these loans, and failed to show that, even if he had such knowledge, he was aware of the fact that the loans were being made to irresponsible persons or upon inadequate securities. The knowledge not having been brought home to the President, and there being no finding that he had benefited in any way by these loans, a judgment against him will not be sustained.

5.

THE ACTION BEING AGAINST THREE TORT-FEASORS FOR DAMAGES FOR NEGLIGENCE, THE RELEASE OF TWO TORT-FEASORS FOR A VALUABLE CONSIDERATION, RELEASED THE THIRD.

Assuming that the bill set up a cause of action, then, the cause of action was against the three members of the Executive Committee for damage the Bank had sustained by reason of their negligence. The action sounded in *tort*, not in contract. They were sued as joint tort-feasors; a joint and several judgment was asked against them for Four Hundred Thousand Dollars, which it is claimed their negligence lost to the Bank. Under the bill no one of the three had caused a greater damage than either of the others; each inflicted the same amount of damage to the corporation; each had failed to perform the duties imposed upon them by the By-Law as members of the Executive Committee. The obligation was joint; the negligence was joint.

For the purpose of this argument, we assume that the rule in actions of this character is that a stockholder bringing the suit for the benefit of the other stockholders has complete control over the litigation until the judgment is entered, and that the law will presume in the absence of fraud that whatever step he took in the course of the litigation was in the interest of the corporation. For the purpose of the suit he represents the corporation. If the theory of the Bill in this case was correct, then, he was entitled to recover judgment against Thompson, Wilson and Thomas jointly for Four Hundred Thousand Dollars, and costs. After the trial Court had rendered its decision in April holding that the corporation was entitled to a judgment against these three for the amount lost to the Bank through the loans of the Cashier, and had appointed a referee to ascertain the aggregate amount of those loans, and after the referee had made his report it was a simple matter to ascertain what the judgment should be. The referee reported that at the time the Bank failed the aggregate amount due on those three loans was $197,092.91. Shortly afterwards the plaintiff in the original action releases two of these joint debtors for $27,500.00 cash. The Findings expressly find this payment by Thompson and Wilson, and direct that it shall be applied on account of the damage that the Bank has sustained. What damage? If the damage was caused by Thomas

only, why should Thompson and Wilson pay $27,500 on account of it, and why should the Bank order their payment credited on the amount due by Thomas to the Bank by reason of his negligence? It is very clear that this money was paid by two of these joint tort-feasors in settlement of the Bank's claim against them, and that as the plaintiff had brought the suit and had the exclusive control of it until it was ended, they felt that he could release them from the corporation's claim. We insist that the payment of $27,500 by Thompson and Wilson and the entering of a judgment of dismissal against them in consideration of that payment, had the same effect as if a judgment had been entered for the plaintiff against Thompson and Wilson for $27,500.00, and had been paid. The condition of affairs then, would have been that in a suit brought against three joint feasors for damages for *tort*, the plaintiff recovered judgment against two jointly for $27,500 and against the third one for $139,419. We submit that such a judgment could not stand. In McCool *vs.* Mahoney, 54 Cal. 491, the plaintiff sued the defendants for malicious arrest and prosecution. The jury rendered a verdict against Mahoney for Three Thousand Dollars and against Small for Five Hundred Dollars and judgment was entered accordingly. The judgment was reversed by this Court on the ground that as the action was for a wrong in which both defendants joined, the damages could not be severed. In Beal *vs.* Finch, 11 New York, 128, which was an action to recover damages for an assault and battery alleged to have been committed by the defendant and five others, the Court held that in such an action the damages were not divisible, and should the jury erroneously assess different amounts against the defendants, the plaintiff should have judgment against all who are convicted for the largest amount found against any one. Supposing in the case at bar the plaintiff had not settled with Wilson and Thompson and released them from the debt, and the Judge had found that Thomas was liable for One Hundred Thousand Dollars, Thompson for Seventy-five Thousand Dollars and Wilson for Fifty Thousand Dollars, could it have stood? The plaintiff had elected to sue them jointly, were not the defendants themselves entitled to a joint judgment?

Could any one of them be deprived of his right to enforce contribution by a settlement made by the plaintiff without his sanction? Under the pleadings, how could the Court find that Thomas was liable for $139,419? It is a mystery to us now how the amount of the judgment was ever reached. The Referee reported the loss to be $197,092.91. The findings fix it at $166,919.00, credit Thompson and Wilson with $27,500.00 and assess the balance to Thomas. In Halsey *vs.* Woodruff; 9 Pick. 555, which was an action for trespass against two defendants, the Court had this to say upon the subject for release to one joint tort-feasor: "The result of the authorities, which are numerous, is, that where a joint action is brought against two for a trespass done and there is a judgment against both, it must be a judgment for joint damages. All the legal consequences of there being a joint judgment must necessarily follow; one of which is, that each is liable for all the damage which the plaintiff has sustained by such trespass without regard to different degrees or shades of guilt. * * * * Each defendant is liable for the whole damages of a joint trespass. *A release to one discharges both, and the reason is, that the damage is joint.*" In Hillman *vs.* Newington, 57 Cal. page 56, which was an action against eight defendants for an injunction to restrain them from diverting the waters of a stream, it was held that the suit was properly brought against the eight, because plaintiff was only entitled to a certain specific amount of water, and as it was only by the joint action of the defendants that he was deprived of that amount, the wrong was committed by them jointly because no one of them alone was guilty of any wrong. Each of them, it is true, diverted some of the water, but the volume was only reduced below the amount to which the plaintiff was entitled by the aggregate act of all. In Urton *vs.* Price, 57 Cal. 270,—an action for damages for personal injuries which was originally brought against Price, but in which plaintiff subsequently obtained an order to add the Mechanics' Institute as a defendant,—a stipulation was filed discontinuing and dismissing the action as to the defendant, The Mechanics' Institute. Judgment of dismissal was

entered as stipulated and the following day Price filed an amended answer in which he set forth that after the commencement of the action, the plaintiff had accepted $500 from the Mechanics' Institute and had dismissed the suit as to the Institute. The jury found that the plaintiff had received satisfaction for the injury alleged in the complaint from one of the defendants. The Court held this to be a release of his claim against Price. In Tompkins *vs.* Clay Street Railroad Company, 66 Cal. 163, an action against two railroad companies to recover damages for personal injuries, and in which class of cases it is the rule that the injured party may sue either or both or dismiss as to either, and if it turned out at the trial that one was not guilty of negligence, he may on sufficient evidence take a verdict against the other, it appeared that one of the companies paid $550 and took a release. The Court found that this was satisfaction as to both.

It is not at all clear that the plaintiff could have brought separate suits against these three Directors for negligence where the negligence consisted in failing to do something which they should have done, but assuming that separate suits had been brought and judgment for different amounts had been rendered in each, there is no doubt that a satisfaction of one judgment would have been a satisfaction of all. This rule was laid down in Livingston *vs.* Bishop, 3d American Decisions, 330, by Chancellor Kent, which held that where separate suits are brought against several defendants for a joint trespass, a separate recovery may be had against each, but the plaintiff can have but one satisfaction and he may elect *de melioribus damnis*, and issue his execution therefor against one of the joint trespasses. "On looking into the books," says the Chancellor, "with a view to this question, I was surprised to meet with so much contradiction and uncertainty on the subject. The cases are not all capable of being reconciled to each other, and some of them appear to me not reconcilable with reason. It is, however, a proposition that is not controverted, but is everywhere admitted, that for a joint trespass, the plaintiff may sue all the trespassers jointly, or each of them separately, and that each is answerable for the act of all. It would seem to result from

this doctrine, that a trial and recovery against one trespasser is no bar to a trial and recovery against another. If there can be but one recovery, it is in vain to say that the plaintiff may bring separate suits, for the cause that happens to be first tried, may be used by way of plea *puis darrien continuance* to defeat the other actions that are in arrear. The more rational rule appears to be, that where you elect to bring separate actions for a joint trespass, you may have separate recoveries, and but one satisfaction; and that the plaintiff may elect *de melioribus damnis*, and issue his execution accordingly; and that where he has made his election, he is concluded by it, and that if he should afterwards proceed against the other defendants, they shall be relieved on payment of their costs." The acceptance by the plaintiff of a money consideration for the release of the two joints tort-feasors was a satisfaction of his claim against all of them, and where the findings show affirmatively that the money was received and credited on the plaintiff's cause of action, a judgment against the remaining tort-feasors cannot be sustained.

It is respectfully submitted that the judgment of the Supreme Court of California be affirmed.

A. H. Ricketts,
Counsel for Richard P. Thomas,
Defendant in Error

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1898.

171 441
s171 447

CALIFORNIA NATIONAL BANK *v.* THOMAS.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 86. Submitted May 4, 1898. — Decided October 17, 1898.

A judgment of the highest court of a State reversing the judgment of the state court below, upon the ground that the case made out by the findings was a different case from that presented by the pleadings, and that the variance was fatal to the validity of the judgment, and on the further ground that as the defendants in error were sued jointly for a tort, a withdrawal of the action in favor of two of them also operated to release the third, presents no Federal question for the consideration of this court.

THIS was an action sounding in tort, but styled a bill of complaint in equity, for an accounting and settlement of a trust by Richard P. Thomas, Robert R. Thompson and Robert A. Wilson. The action was instituted in the Superior Court of San Francisco by John Chetwood, Junior, for himself and as the representative of all the stockholders of the California National Bank, which bank had failed and was at the time in the hands of a receiver.

The bill alleged that the failure was due to the negligence of Richard P. Thomas, president; Robert R. Thompson, vice

president; and Robert A. Wilson, a director, composing the executive committee of the corporation, who had as such committee contrived together to injure and deceive the said corporation by neglecting to conform to its by-laws; and as such committee had made worthless loans, whereby the money of the corporation was wasted, misused and lost to the amount of about $200,000.

Among the duties and powers of the committee, as set forth in the by-laws adopted by the bank, were an immediate supervision of all the officers and business of the bank; auditing all bills for current and other expenses; discounting and purchasing bills, notes and other evidences of debt; and reporting to the directors at each regular meeting all bills, notes and other evidences of debt discounted or purchased by them for the bank. It was further provided by the by-laws that the president should have general control and supervision of the bank, and be responsible for its condition to the directors. The vice president was to assist the president in the discharge of his duties.

The bill alleged that "it was the duty of each of said members of the executive committee to exercise, concurrently with his associates on said committee, diligence and fidelity in performing the duties of said committee," but that "they negligently permitted the cashier of said bank to control and manage the whole business of the said bank as he saw fit and without consulting or in anywise informing said defendants," and that by reason of the negligence of said defendants, and the acts and misconduct of the cashier, negligently permitted as aforesaid, the bank suddenly failed on December 15, 1888, owing about $450,000, and the Comptroller of the Currency had placed a receiver in charge of said bank and its affairs, and thereafter levied an assessment of $75,000 upon the stockholders, which sum was all paid except $20,000 assessed against Richard P. Thomas, the president of the bank.

The prayer of the bill was that a decree might be entered holding Richard P. Thomas, Robert R. Thompson and Robert A. Wilson to an accounting of their trust, and that a joint and several money judgment be entered against them for the sum

of $400,000, with legal interest thereon from the time of such loss.

The defendants answered the bill, denying the allegations as to negligence on their part.

Upon the cause being submitted to the court, a judgment was "entered in favor of the plaintiff and against Richard P. Thomas, Robert R. Thompson and Robert A. Wilson," and the case was referred to a master, who found the actual loss of the bank to be $166,919. Before a final judgment was rendered by the court, however, the suit was dismissed by the plaintiff as to Robert R. Thompson and Robert A. Wilson, from whom had been collected the sum of $27,500, thus leaving a net loss to the bank of $139,419, and judgment for this amount was rendered against Richard P. Thomas.

Thereupon, Thomas appealed to the Supreme Court of the State of California, by which court the judgment was reversed, and the case remanded to the trial court, with directions to enter a judgment in favor of the defendant Thomas. 113 California, 414.

The plaintiff thereupon sued out a writ of error to this court, assigning as the principal ground to give this court jurisdiction that the judgment of the Supreme Court of the State was rendered without due or any process of law, and deprived the plaintiff of its property without due process of law, contrary to the Constitution, etc., and Rev. Stat. § 5136, relating to national banks.

The defendant in error in this court moved to dismiss the case for want of jurisdiction.

Mr. A. H. Ricketts for the motion.

Mr. E. G. Knapp, *Mr. Robert Rae* and *Mr. John Chetwood, Jr.*, opposing.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

Unless the plaintiff in error was denied some right under the Constitution or statutes of the United States, "specially

set up and claimed" by it, this writ of error must be dismissed.

The bill of complaint, filed in the Superior Court of San Francisco by a stockholder of the California National Bank, sought to charge three directors of the bank with negligence in the performance of their trust, and particularly in failing to comply with certain by-laws of the bank, by which large amounts of money were lost to the bank, which the bill prayed that the defendants might be decreed to make good and restore. The bank was chartered under the National Banking Act and the by-laws were adopted in pursuance of Revised Statutes, section 5136, which authorizes associations incorporated under the act to define the duties of the president and other officers and to regulate the manner in which its general business shall be conducted. Certain transactions of the directors are also alleged to be infractions of Revised Statutes, section 5200, for which the directors are made liable in section 5239, although no violations of this section are specifically alleged in the bill.

Demurrers were interposed by the several defendants and overruled; when answers were filed denying in general the allegations of the bill. The court subsequently entered judgment against the three directors, but, being unable to determine the proper amount, appointed a referee to take proof of the amount appearing to be due and owing to the bank from certain named individuals. Upon such report having been made, a stipulation was entered into between the plaintiff stockholder and the defendants Thompson and Wilson, whereby the plaintiff renounced and withdrew his action against such defendants, and the court, upon such stipulation, entered a judgment dismissing the action as against them. The court thereupon made a finding of all the facts in the case, among which was one to the effect that there had been collected of the two defendants Thompson and Wilson the sum of $27,500, leaving a net loss to the bank of $139,419, for which judgment was entered against the defendant Thomas. Thomas thereupon appealed to the Supreme Court of the State from the judgment so entered.

Opinion of the Court.

That court was of opinion that the complaint, though entitled "a bill in equity for the accounting and settlement of a trust," contained nothing more than a charge *ex delicto* against the directors for a breach and non-performance of their duties. It did not consider it necessary to dispose of the objections to the complaint; but assumed, without deciding, that the complaint was sufficient to state a cause of action in its averments of misconduct. It then proceeded to decide (1) that the complaint was one sounding in tort, and that the defendants were charged as joint tortfeasors; that their negligence was pleaded as their joint neglect to perform duties not individually imposed upon them, but collectively undertaken as members of the executive committee; that in the findings of fact no mention was made of any dereliction of duty on the part of Thompson and Wilson, and that there was an absolute failure by the court to find upon the most material issues of the case — the joint negligence of the three defendants, which alone, it was alleged, had occasioned loss to the bank. "Such," said the court, "is the cause of action pleaded in the complaint. The findings, if it be conceded that they give evidence of a meritorious cause of action against the defendant Thomas, do so because of a showing that he was negligent, not with the other defendants and as member of the executive committee, but that he was individually and separately negligent in the performance of his duties as president. But this is not the cause of action pleaded against him, and it is well settled that, where the case made out by the findings is a different case from that presented by the pleadings, the judgment will be reversed; for the relief decreed must be the relief sought, and a variance, even if it be such as could have been cured by amendment, is fatal to the validity of the judgment." The court further held (2) that, as the defendants in error were sued jointly for a tort, a withdrawal of the action in favor of Thompson and Wilson operated also to release the defendant Thomas. This was in fact the main reason given for its conclusion. The court thereupon ordered the judgment to be reversed, and the cause remanded with directions to enter judgment in favor of the defendant Thomas.

In all this record there was no Federal right specially set up or claimed by the plaintiff in error until after the judgment in the Supreme Court, when a petition for writ of error was filed by the California National Bank, a co-defendant with Thomas in the original action, in which various allegations were made of a denial of Federal rights. But assuming that a Federal question might be extorted from the allegations of the complaint, it is sufficient to say that the case was not disposed of upon the merits of such complaint, which was treated as sufficient, but upon a variance between its allegations and the proofs, and upon the settlement made with the defendants Thompson and Wilson, and the withdrawal of the action against them. These were purely questions under the law of the State, as to which the opinion of the Supreme Court was conclusive. Not only was no suggestion of a Federal question made to the trial court or to the appellate court, but there was nothing to indicate that the judgment rendered could not have been given without deciding a Federal question. Indeed, the opinion shows that the cause was decided, as it might well have been, solely upon grounds not involving such question.

Whether a judgment should be ordered in favor of Thomas for a dismissal of the action against him or simply for a new trial, involved merely a question of the procedure under the law of the State. The court might have been, and probably was, of the opinion that an action would lie upon the separate liability of Thomas, and have reserved for future consideration the question whether the dismissal of this action upon a joint liability would operate as an estoppel against a new action upon his individual liability.

There was no Federal question involved in the disposition of this case, and the writ of error is, therefore,

Dismissed.